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# Property Law: 1997 Survey of Florida Law

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# Property Law: 1997 Survey of Florida Law

Ronald Benton Brown\*

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## I. INTRODUCTION

This survey covers the decisions of the Florida courts and Florida legislation produced during the period from July 1, 1996, through June 30, 1997, especially selected for this article as being of potential interest to the real estate practitioner.

## II. ATTORNEYS' FEES

*Brevard County v. Canaveral Properties, Inc.*<sup>1</sup> The attorneys' fees awarded in this eminent domain case were calculated to include twenty percent of the benefit to the landowner, which included severance damages.<sup>2</sup> However on appeal, the severance damages were stricken.<sup>3</sup> When reconsidering the attorneys' fees, the trial court merely subtracted the benefit and left the rest of the calculation intact.<sup>4</sup> The Fifth District Court of Appeal found that to be an unacceptable approach.<sup>5</sup> The court pointed out that the statute<sup>6</sup> required the court to give the greatest weight to the benefit the attorney achieved for the client, and that the calculation in this case was "based on expert testimony which itself was predicated on the landowners' very substantial recovery."<sup>7</sup> When the district court reduced the recovery, it reduced the benefit achieved by the attorney.<sup>8</sup> Consequently, the trial court was required to completely recalculate the attorneys' fees based upon the record.<sup>9</sup> Furthermore, it ruled, no additional attorneys' fees should be awarded for relitigating the attorneys' fee.<sup>10</sup>

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1. 689 So. 2d 1309 (Fla. 5th Dist. Ct. App. 1997).

2. *Id.* at 1309.

3. *Id.*

4. *Id.*

5. *Id.* at 1309-10.

6. FLA. STAT. § 73.092(1) (1993).

7. *Canaveral Properties*, 689 So. 2d at 1309.

8. *Id.* at 1310.

9. *Id.*

10. *Id.* (citing *Seminole County v. Butler*, 676 So. 2d 451 (Fla. 5th Dist. Ct. App. 1996)).

This case returned to the district court after the trial court awarded \$55,647.00 in appellate attorneys' fees.<sup>11</sup> The County claimed the amount was excessive and the district court agreed because it concluded that multiple attorneys had performed duplicate tasks.<sup>12</sup> For example, four attorneys had prepared for the oral argument and two had attended the argument even though only one had actually presented the argument. Furthermore, the firm had claimed over 402 hours were spent on the appeal, even though much of the research should have already been performed for the trial. The fact that four property owners were represented by the one law firm was considered, but did not figure into the court's ultimate reasoning. Each owner could have had its own counsel, but declined individual representation. The criterion for measuring attorneys' fees was reasonableness.<sup>13</sup> Where the hours were bloated, or a task was performed by more attorneys than were needed, the public should not have to pay the excess.<sup>14</sup>

*Broward County v. LaPointe*.<sup>15</sup> The County made an offer to buy land for \$2,404,000 subject to the condition that if environmental contamination was found, it could cancel the contract or adjust the price based on the cost of the environmental clean up. When the landowners rejected the offer, the County began a condemnation proceeding. In 1991, the County's expert estimated the cost of additional testing and clean up at \$1,147,267. The parties entered an agreed order of taking to allow title to pass to the County and proceeded to litigate the landowner's compensation. The case was eventually settled and the settlement terms were incorporated into a stipulated final judgment.<sup>16</sup>

In addition to the award of \$3,704,480 for the land taken, the settlement provided that the landowner was entitled to: 1) back rent from a billboard tenant; 2) the right to lease back part of the condemned land for billboards; and 3) the agreement that if the County was ever required to perform an environmental clean up of the taken land, it would install a system where it could perform that clean up, not only for the taken land, but also for the adjacent land still owned by the condemnee. The settlement also provided that the court would retain jurisdiction over the agreement for the purpose of

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11. *Brevard County v. Canaveral Properties*, 696 So. 2d 1244, 1244 (Fla. 5th Dist. Ct. App. 1997).

12. *Id.* at 1244-45.

13. *Id.* at 1245.

14. *Id.*

15. 685 So. 2d 889 (Fla. 4th Dist. Ct. App. 1996).

16. *Id.* at 890-91.

awarding attorneys' fees and costs "including all costs of environmental contamination issues."<sup>17</sup>

In figuring the attorneys' fees for the landowners' trial counsel, the circuit court first figured that the firm "had reasonably spent 2,400 hours . . . at a reasonable blended rate of \$250 per hour."<sup>18</sup> This produced a "lodestar" amount of \$600,000. Due to the fact that the contamination issues made the case "novel and complex,"<sup>19</sup> the trial court also awarded a success bonus.<sup>20</sup> The court figured this amount by starting with the initial government offer of \$2,404,000 and subtracted its initial clean up estimate of \$1,147,267 to produce an adjusted offer of \$1,256,753.<sup>21</sup> It subtracted the adjusted offer from the compensation award of \$3,704,000 to produce a benefit achieved of \$2,447,267.<sup>22</sup> The court added to this the monetary value of the other settlement provisions, which it determined was \$1,129,000, to produce a total benefit value of \$3,576,267.<sup>23</sup> The success bonus of ten percent of that total benefit, i.e., \$357,626, was added to the lodestar amount to produce an attorneys' fee of \$957,626.<sup>24</sup>

The County objected to the method by which the success bonus was calculated. The County claimed that its initial offer should not have been reduced by its initial clean up estimate. Additionally, the County claimed that the benefit should be mechanically calculated by subtracting the initial offer from the final figure. In response, the district court pointed out that the initial offer contained a clean up contingency that could have substantially reduced the amount the landowners received.<sup>25</sup> The landowners' counsel was successful in eliminating that contingency, in effect shifting the burden of environmental clean up to the County. It was not an abuse of discretion for the trial court to consider that as a benefit achieved for the landowners or to set the value at the County's own initial estimate.<sup>26</sup> In addition, it was not an abuse of discretion for the trial court to set a monetary figure for the value of the other settlement provisions and to include that in the calculations.<sup>27</sup> The

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17. *Id.* at 891.

18. *Id.*

19. *Id.* (quoting the trial court).

20. *LaPointe*, 685 So. 2d at 891.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *LaPointe*, 685 So. 2d at 892.

26. *Id.*

27. *Id.*

court's valuation was within the range of expert testimony in the record.<sup>28</sup> On these issues, the trial court's decision was affirmed.<sup>29</sup>

A more difficult issue was whether the County should pay the attorneys' fees of two law firms hired to represent the landowners in dealing with the Department of Environmental Regulation. They did obtain a favorable consent order which made possible the eventual settlement of the condemnation case, but the court concluded that whether the County was liable for their fees should be determined by the settlement agreement itself.<sup>30</sup> The agreement provided for payment of the landowners' "costs and attorney's fees, including all costs of environmental contamination issues."<sup>31</sup> The court placed great importance on the fact that the settlement agreement allowed for reimbursement of costs, not all costs and attorneys' fees of environmental contamination issues.<sup>32</sup> Invoking the plain meaning canon of construction, although negative implication would have been more convincing, the court decided that the agreement did not include paying attorneys who handled related regulatory matters.<sup>33</sup> The court ignored the point that the very statute under which attorneys' fees and costs were recoverable in condemnation cases included attorneys' fees within the term "costs."<sup>34</sup>

*City of Jacksonville v. Tresca*.<sup>35</sup> The City was involved in a redevelopment project. It tried unsuccessfully to obtain an option to purchase the land for \$107,000. Later, when condemnation proceedings had begun, the City deposited \$50,000 into the registry of the court. The district court said that this was "presumably the good-faith estimate of the property value based on a valid appraisal," a point never disputed by the City.<sup>36</sup> The jury concluded that the proper amount of compensation for the landowner was \$182,000.<sup>37</sup> Attorneys' fees under section 73.092 of the *Florida Statutes* are to be based "solely on the benefits achieved for the client."<sup>38</sup> Thus, "[b]ased

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28. *Id.*

29. *Id.* at 892-93.

30. *Lapointe*, 685 So. 2d at 892.

31. *Id.*

32. *Id.* at 892-93.

33. *Id.* at 893.

34. FLA. STAT. § 73.091 (1989).

35. 692 So. 2d 991 (Fla. 1st Dist. Ct. App. 1997).

36. *Id.* at 992.

37. *Id.*

38. *Id.* at 992-93 (quoting FLA. STAT. § 73.092(1) (1995)).

on the \$107,000 figure, the trial court awarded a fee in the amount of \$24,750 (thirty-three percent of \$182,000 minus \$107,000).<sup>39</sup>

The district court found that to be error.<sup>40</sup> The statute defined benefit as

the difference, exclusive of interest, between the final judgment or settlement and the last written offer made by the condemning authority before the defendant hires an attorney. If no written offer is made by the condemning authority before the defendant hires an attorney, benefits must be measured from the first written offer after the attorney is hired.<sup>41</sup>

The "offer" contemplated by the statute was an offer to buy which, when accepted by the landowner, would obligate the condemnor to buy at that price.<sup>42</sup> But, a purchase option would not even have obligated the City to buy the property.<sup>43</sup> The proper measure of betterment would be to use the \$50,000 deposit as urged by the condemnnee's attorneys.<sup>44</sup>

*Department of Environmental Protection v. Gibbins*.<sup>45</sup> The landowner's neighbor operated a service station which discharged gasoline from underground storage tanks. In order to define the extent of the resultant contamination, the Department of Environmental Protection notified the landowner that it wanted to drill a number of wells on the landowner's property. The landowner resisted and demanded compensation, so the Department served him with an administrative order for access. In response to the landowner's demand for a formal hearing, the Department withdrew its administrative action and filed a complaint in court for injunctive relief against the landowner interfering with the installation of wells on his land. The Department later decided that was unnecessary and moved for voluntary dismissal, but the landowner filed a motion for attorney's fees on the theory that he had defeated an attempt by the government to take his land. The circuit court agreed and awarded substantial attorney's fees.<sup>46</sup>

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39. *Tresca*, 692 So. 2d at 992.

40. *Id.* at 993.

41. *Id.* (citing Fla. STAT. § 73.092(1)(a)).

42. *Tresca*, 692 So. 2d at 993.

43. *Id.* See generally, Ronald Benton Brown, *An Examination of Real Estate Purchase Options*, 12 NOVA L. REV. 147, 147-54 (1987).

44. *Tresca*, 692 So. 2d at 993. It is not clear from the case whether the \$50,000 was considered the final written offer before the hiring of the attorney or the first written offer after the hiring the of attorney.

45. 696 So. 2d 888 (Fla. 5th Dist. Ct. App. 1997).

46. *Id.* at 888-89.



The district court reversed.<sup>47</sup> It reasoned that no condemnation proceeding was ever begun so the landowner could not have succeeded in defeating the condemnation attempt.<sup>48</sup> As the statutes relied upon only provide for attorney's fees in condemnation proceedings,<sup>49</sup> there would be no basis for awarding attorney's fees in this case.<sup>50</sup>

*Department of Transportation v. Winter Park Golf Club, Inc.*<sup>51</sup> The Department of Transportation began a quick taking of an easement for sidewalk construction. After the landowner marshalled evidence that the taking would result in a significant reduction in the market value of its land and significant severance damages, the Department decided to locate the sidewalk elsewhere. The stipulated judgment terminating the taking action provided that the Department would pay the landowner's reasonable costs and attorney's fees. The trial court used a lodestar figure reached by multiplying the number of hours by a reasonable hourly rate (\$225 per hour).<sup>52</sup> This amount was adjusted upward to reflect the benefit achieved for the landowner. However, the trial court erred in one respect. It included in the calculation the hours that the landowner's attorney spent litigating the attorney's fee.<sup>53</sup> The district court remanded the case for recalculation of the lodestar amount which did not include fees for time spent litigating the attorney's fee.<sup>54</sup>

*Lee County v. Pierpont.*<sup>55</sup> The County did a "quick taking"<sup>56</sup> of the property and, accordingly, filed a good faith estimate of the property's value. When the landowners filed an answer to the condemnation complaint through an attorney, the County's attorney sent him a letter making an offer for the property at twenty percent over the good faith estimate. That offer was rejected, but the case was eventually settled. The only issue left was attorney's fees.<sup>57</sup>

In 1994, the legislature amended the attorneys' fees provision in eminent domain proceedings.<sup>58</sup> Previously, the statute had provided that "the court

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47. *Id.* at 890.

48. *Id.*

49. FLA. STAT. §§ 73.091-.092 (1993).

50. *Gibbins*, 696 So. 2d at 890.

51. 687 So. 2d 970 (Fla. 5th Dist. Ct. App. 1997).

52. *Id.* at 971.

53. *Id.* (citing *State Farm Fire & Cas. Co. v. Palma*, 629 So. 2d 830 (Fla. 1993); *Seminole County v. Butler*, 676 So. 2d 451 (Fla. 5th Dist. Ct. App. 1996)).

54. *Id.* at 971.

55. 693 So. 2d 994 (Fla. 2d Dist. Ct. App. 1997).

56. *See generally*, Marc I. Sachs, *Order of Taking*, THE FLORIDA BAR CLE: FLORIDA EMINENT DOMAIN PRACTICE AND PROCEDURE Ch. 7 (4th ed. 1988).

57. *Pierpont*, 693 So. 2d at 995-96.

58. *Id.* at 995.

shall give greatest weight to the benefits resulting to the client from the services rendered.”<sup>59</sup> This was amended to read, “the court, in eminent domain proceedings, shall award attorney’s fees based solely on the benefits achieved for the client.”<sup>60</sup> The statute went on to define benefits as

the difference, exclusive of interest, between the final judgment or settlement and the last written offer made by the condemning authority before the defendant hires an attorney. If no written offer is made by the condemning authority before the defendant hires an attorney, benefits must be measured from the first written offer after the attorney is hired.<sup>61</sup>

Here, the trial court determined betterment by subtracting the good faith estimate from the final settlement.<sup>62</sup> The Second District Court of Appeal held that the trial court determination was incorrect and reversed.<sup>63</sup>

The court used the plain meaning approach to interpreting the new statute.<sup>64</sup> The legislature had specified that the benefit was to be calculated from the first written offer; however, it had not provided that the good faith estimate could be used as an alternative figure.<sup>65</sup> In addition, the good faith estimate was not a functional equivalent of a written offer because the condemnee could not accept that figure creating an enforceable contract, and the condemnor was in no way bound by that good faith estimate.<sup>66</sup>

Judge Blue dissented on this point.<sup>67</sup> First, he contends there is no clear precedent that the condemnee cannot simply accept the good faith estimate.<sup>68</sup> The precedents only hold that the condemnor is not bound at trial by the prior good faith estimate.<sup>69</sup> He utilized a purpose approach to reach a contrary conclusion. Figuring attorneys’ fees from the good faith estimate would “encourage condemning authorities to make realistic estimates” since a low estimate might later result in higher attorneys’ fees.<sup>70</sup> The majority’s approach would encourage condemning authorities not to make a written offer, but to

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59. FLA. STAT. § 73.092(1) (1993).

60. *Pierpont*, 693 So. 2d at 995 (citing FLA. STAT. § 73.092(1) (Supp. 1994)).

61. *Id.* (quoting FLA. STAT. § 73.092(1)(a) (Supp. 1994)).

62. *Id.* at 996.

63. *Id.* at 997.

64. *Id.* at 996-97.

65. *Pierpont*, 693 So. 2d at 996.

66. *Id.*

67. *Id.* at 997 (Blue, J., dissenting).

68. *Id.*

69. *Id.* at 998.

70. *Pierpont*, 693 So. 2d at 998.

use the estimate as the starting point in negotiations.<sup>71</sup> This would allow the advantage of using a low estimate, the same way the initial offer is used, but without the disadvantage of having attorneys' fees figured from that low number.<sup>72</sup> Since that approach could artificially shrink attorneys' fees in condemnation cases, landowners might have greater difficulty in finding competent counsel to handle these cases, thereby defeating the constitutional right to compensation.<sup>73</sup> This author<sup>74</sup> agrees with Judge Blue's approach. The burden should be on the condemnor to make a timely written offer. Where the condemnor has not done so, he should not be allowed to penalize the victim of for the victim's tardiness.

The district court also rejected the landowners' claim that the county attorney's letter was not a valid offer because it was made in violation of the State of Florida's Sunshine Law.<sup>75</sup> Essentially, their argument is that the county attorney was vested with discretion about the amount of money to offer and that before exercising that discretion, he was obliged to hold a public meeting.<sup>76</sup> Even if that was a valid argument, the landowners' would have no standing to raise it on appeal, as it was not challenged at trial.<sup>77</sup>

*Regency Homes of Dade, Inc. v. McMillen*.<sup>78</sup> The homeowners brought this action based on claims of breach of the construction contract, negligence, and fraud. The contractor counterclaimed on numerous theories and sought foreclosure of its construction lien. The homeowners prevailed on the merits, and they sought attorney's fees based solely on the statutory provision applicable to actions to enforce construction liens.<sup>79</sup> They could not seek attorney's fees for the other claims because the construction contract did not provide for attorney's fees. The contractor appealed the attorney's fees award because the court did not apportion the attorney's time and fees between the different claims.<sup>80</sup> The district court affirmed.<sup>81</sup> It reasoned that "the issues involved in defending against the construction lien claim are intertwined with the remaining issues in the case, and that the attorney's time cannot

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71. *Id.*

72. *Id.*

73. *Id.*

74. Professor Ronald Benton Brown.

75. *Pierpont*, 693 So. 2d at 997 (citing FLA. STAT. § 286.011 (1993)).

76. *Id.*

77. *Id.*

78. 689 So. 2d 1204 (Fla. 3d Dist. Ct. App. 1997).

79. *Id.* at 1204-05 (citing FLA. STAT. § 713.29 (1995)).

80. *Id.* at 1205.

81. *Id.*

reasonably be apportioned.”<sup>82</sup> It distinguished an earlier case in which apportionment was possible because the issues were distinct.<sup>83</sup>

*Sanctuary of Boca, Inc. v. Careers USA, Inc.*<sup>84</sup> The landlord and tenant got into a dispute over the proper amount of rent due under the lease. The tenant brought and won a declaratory judgment action and sought attorneys’ fees under the lease which stated, “[i]n any litigation between the parties hereto to enforce the terms and conditions of this Lease, the prevailing party shall be entitled to recover all costs incurred in such action, including attorneys’ fees at all levels from the nonprevailing party.”<sup>85</sup> The trial court denied attorneys’ fees, reasoning that the action had not been brought “to ‘enforce’ the terms and conditions” but to interpret them.<sup>86</sup> The district court rejected this logic and reversed.<sup>87</sup> The court determined that the substance of the landlord’s defense was the equivalent of trying to enforce its interpretation of the lease.<sup>88</sup> If the landlord had failed to defend this action, it would have been precluded from trying to enforce its claim in a later action. The court also distinguished cases involving attorneys’ fees provisions that applied in the event of a breach.<sup>89</sup> Since no breach had occurred in this case, the tenant would not be in a position to claim attorneys’ fees under such a provision. However, that was not the provision in this lease. Noting that different results have been reached in other districts,<sup>90</sup> the court certified the conflict to the Supreme Court.<sup>91</sup>

*Seminole County v. Coral Gables Federal Savings & Loan Ass’n.*<sup>92</sup> In this eminent domain case, attorney’s fees were awarded pursuant to section

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82. *Id.*

83. *McMillen*, 689 So. 2d at 1205 (citing *Metro-Centre Assocs. v. Environmental Eng’rs, Inc.*, 522 So. 2d 967 (Fla. 3d Dist. Ct. App. 1988) (holding apportionment was possible because a counterclaim for goods and services was raised in response to an action to enforce a mechanic’s lien)).

84. 691 So. 2d 596 (Fla. 4th Dist. Ct. App. 1997).

85. *Id.* at 598.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Sanctuary of Boca*, 691 So. 2d at 598-99 (citing *Casarella, Inc. v. Zarembo Coconut Creek Parkway Corp.*, 595 So. 2d 162 (Fla. 4th Dist. Ct. App. 1992); *Fairways Royale Ass’n v. Hasam Realty Corp.*, 428 So. 2d 288 (Fla. 4th Dist. Ct. App. 1983); *Chesterfield Co. v. Rizenheim*, 350 So. 2d 15 (Fla. 4th Dist. Ct. App. 1977)).

90. *Id.* at 599. See *Martin L. Robbins, M.D., P.A. v. I.R.E. Real Estate Fund, Ltd.*, 608 So. 2d 844, 846 (Fla. 3d Dist. Ct. App. 1992); *Ocala Warehouse Invs., Ltd. v. Bison Co.*, 416 So. 2d 1269 (Fla. 5th Dist. Ct. App. 1982).

91. *Sanctuary of Boca*, 691 So. 2d at 599.

92. 691 So. 2d 614 (Fla. 5th Dist. Ct. App. 1997).

73.092 of the *Florida Statutes*.<sup>93</sup> The County appealed claiming that the statute was “unconstitutional because it deprives trial courts of the ability to determine a reasonable fee to a landowner based upon the criteria listed in *Florida Patient’s Compensation Fund v. Rowe*.”<sup>94</sup> This argument had already been tried unsuccessfully with an earlier version of the statute<sup>95</sup> and was proved unsuccessful again because the Supreme Court of Florida had already ruled that “the legislature can enact attorney’s fees provisions which ‘it deems will result in a reasonable award.’”<sup>96</sup>

The County next tried the novel approach of claiming that the trial court should not have admitted the County’s written offer because section 90.408 of the *Florida Statutes* prohibits introduction into evidence of an offer to settle litigation.<sup>97</sup> That section directly contradicts the mandate of section 73.092 of the *Florida Statutes* because it provides that attorneys’ fees shall be based on the benefits achieved which are measured by the difference between the last written offer and the final judgment or settlement.<sup>98</sup> The court utilized two canons of statutory interpretation to reject this argument.<sup>99</sup> First, a later enactment prevails over an earlier one where there is a direct conflict.<sup>100</sup> Second, a specific statute prevails over a general one.<sup>101</sup> Section 73.092 is specific in that it applies only to eminent domain proceedings, while section 90.408 is applicable to litigation in general.<sup>102</sup>

*Seminole County v. Cumberland Farms, Inc.*<sup>103</sup> In this eminent domain case, the trial court apparently based the award of attorneys’ fees on the following formula: One-third of the benefit (the amount paid for the property less the County’s original offer) times two, plus the lodestar (hourly rate),

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93. FLA. STAT. § 73.092 (Supp. 1994).

94. *Coral Gables Fed. Sav.*, 691 So. 2d at 614 (citing *Florida Patient’s Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985)).

95. See *Seminole County v. Delco Oil, Inc.* 669 So. 2d 1162 (Fla. 5th Dist. Ct. App. 1996); *Seminole County v. Clayton*, 665 So. 2d 363 (Fla. 5th Dist. Ct. App. 1995) (challenging FLA. STAT. § 73.02 (1993)).

96. *Coral Gables Fed. Sav.*, 691 So. 2d at 615 (quoting *Shick v. Department of Agric. & Consumer Servs.*, 599 So. 2d 641, 664 (Fla. 1992)).

97. *Id.*; see FLA. STAT. § 90.408 (1995).

98. *Coral Gables Fed. Sav.*, 691 So. 2d at 615; see FLA. STAT. § 73.092 (1995).

99. *Coral Gables Fed. Sav.*, 691 So. 2d at 615 (citing *Starr Tyme, Inc. v. Cohen*, 659 So. 2d 1064, 1067 (Fla. 1995); *People Against Tax Revenue Mismanagement, Inc. v. County of Leon*, 583 So. 2d 1373, 1377 n.5 (Fla. 1991)).

100. *Id.* (citing *Starr Tyme, Inc. v. Cohen*, 659 So. 2d 1064, 1067 (Fla. 1995)).

101. *Id.* (citing *People Against Tax Revenue Mismanagement, Inc. v. County of Leon*, 583 So. 2d 1373, 1377 n.5 (Fla. 1991)).

102. See FLA. STAT. §§ 90.408, 73.092 (1995).

103. 688 So. 2d 372 (Fla. 5th Dist. Ct. App. 1997).

divided by three.<sup>104</sup> While the trial court's method was based on a fourth district case,<sup>105</sup> the Fifth District Court of Appeal reversed.<sup>106</sup> Two subsequent fifth district cases<sup>107</sup> had established that the court should have

used the lodestar as the basis for the fee and then expressly set forth the number of hours reasonably expended in the litigation and the reasonable hourly rate. The benefit obtained should have then been used to adjust the lodestar up or down by a specific dollar amount as opposed to a multiplier, to reflect the attorney's unusual success or failure.<sup>108</sup>

*Department of Transportation v. ABS Properties Partnership.*<sup>109</sup> The Department of Transportation ("DOT") began a condemnation proceeding and made an initial written offer. Mediation produced a stipulated settlement that was approved by both parties when DOT decided to indefinitely postpone the project. DOT obtained a voluntary dismissal of the condemnation action. The landowner filed a motion for attorney's fees. The trial court's award was based on the difference between DOT's written offer and the agreed upon price in the stipulation or the benefit achieved under section 73.092(1) of the *Florida Statutes*.<sup>110</sup>

DOT's position on appeal was that the "benefit achieved" subsection should not be used when the benefit was never realized due to the case being withdrawn. That presented a question of first impression.<sup>111</sup> The district court agreed with DOT and reversed.<sup>112</sup> The applicable method was in the second subsection which governed attorney's fees "'incurred in defeating an order of taking, or for apportionment, or other supplemental proceedings, when not otherwise provided for.'" <sup>113</sup> To the court, a voluntary dismissal seemed to fit within that definition.<sup>114</sup> Under subsection two, the court would have to consider a number of factors, such as: 1) novelty; 2) difficulty and

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104. *Id.* at 373; *see also* *Solid Waste Auth. v. Parker*, 622 So. 2d 1010 (Fla. 4th Dist. Ct. App. 1993).

105. *Solid Waste Auth.*, 622 So. 2d at 1010.

106. *Cumberland Farms, Inc.*, 688 So. 2d at 373.

107. *Seminole County v. Delco Oil, Inc.*, 669 So. 2d 1162 (Fla. 5th Dist. Ct. App. 1996); *Seminole County v. Clayton*, 665 So. 2d 363 (Fla. 5th Dist. Ct. App. 1995).

108. *Cumberland Farms Inc.*, 688 So. 2d at 373 (citations omitted).

109. 693 So. 2d 703 (Fla. 2d Dist. Ct. App. 1997).

110. *Id.* at 703-04 (citing FLA. STAT. § 73.092(1) (1995)).

111. *Id.* at 704.

112. *Id.* at 705.

113. *Id.* (quoting FLA. STAT. § 73.092(2) (1995)).

114. *ABS Properties Partnership*, 693 So. 2d at 705.

importance of the questions involved; 3) the skill employed by the attorney; 4) the amount of money involved; 5) the responsibility born by the attorney; 6) the time and labor required of the attorney to adequately represent the client in relation to the benefits; and 7) the customary rate or fee for a comparable case.<sup>115</sup>

This author<sup>116</sup> prefers the trial court's conclusion. The condemnor's change of heart should not affect the amount of attorney's fees for work that has already been done, and the calculation in subsection two is needlessly complicated when a simple measure is provided by subsection one, i.e., based upon the benefits achieved. It seems obvious that subsection two should be used when there is no logical way to use subsection one, but that is certainly not the case here where an agreement had already been reached.

### III. BROKERS

The Brokerage Relationship Disclosure Act<sup>117</sup> became effective on October 1, 1997. It is the latest step in Florida's attempt to solve the problems inherent in the relationships, agency or nonagency, that brokers may have with buyers and sellers.<sup>118</sup> The legislature has now outlawed brokers acting as dual agents, i.e., simultaneously acting in an agency relationship for both the buyer and the seller.<sup>119</sup> However, it continues to allow brokers to be transaction brokers who provide "limited representation to a buyer, a seller, or both, in a real estate transaction, but does not represent either in a fiduciary capacity or as a single agent."<sup>120</sup> The act further requires that the broker or salesperson disclose to customers upon first contact, that they can only engage that professional as a single agent or transaction broker.<sup>121</sup> The statute defines those relationships and specifies the duties of each type of broker.<sup>122</sup> For a

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115. *Id.* (citing FLA. STAT. § 73.092(2) (1995)).

116. Professor Ronald Benton Brown.

117. FLA. STAT. §§ 475.2701-.2801 (1995), amended by 1997 Fla. Laws ch. 97-42. See Ronald Benton Brown and Joseph M. Grohman, *Goodbye Dual World: Real Estate Brokerage Changes Again, But Not Enough*, 71 FLA. B.J. 54 (Nov. 1997).

118. See Ronald Benton Brown & Joseph M. Grohman, *Real Estate Brokers: Shouldering New Burdens*, 11 PROBATE & PROPERTY 14 (May/June 1997); Ronald Benton Brown et al., *Real Estate Brokerage: Recent Changes in Relationships and a Proposed Cure*, 29 CREIGHTON L. REV. 25 (1995). See also Ronald Benton Brown & Thomas H. Thurlow, *Buyers Beware: Statutes Shield Real Estate Brokers and Sellers Who Do Not Disclose that Properties are Psychologically Tainted*, 49 OKLA. L. REV. 625 (1997).

119. FLA. STAT. § 475.01(1)(j) (1995), amended by 1997 Fla. Laws ch. 97-42.

120. *Id.* § 475.01(1)(m).

121. *Id.* § 475.272(2).

122. *Id.* § 475.01(1)(m).

residential sale, the disclosure requirements are now more extensive. Section 475.276 of the *Florida Statutes* now requires potential buyers and sellers to be given a statutory notice of nonrepresentation at the first contact.<sup>123</sup> Additionally, section 475.278 of the *Florida Statutes* now provides what must be in the disclosure forms describing the transaction or single agency brokerage relationships.<sup>124</sup>

*Caserta v. Department of Business & Professional Regulation*.<sup>125</sup> The Florida Real Estate Commission ("FREC") issued a final order revoking Caserta's real estate license.<sup>126</sup> Caserta's counsel had filed a request for a subject-matter index of the all agency orders imposing discipline since January 1, 1975. FREC had responded by giving him a subject-matter index starting at January 1, 1992. On appeal, Caserta claimed that reversal of the order was required because the index FREC had provided was not sufficient to satisfy the statutory requirements. The Fifth District Court of Appeal disagreed and affirmed the order.<sup>127</sup>

Section 120.53(2) of the *Florida Statutes* previously required that each state agency make available to the public a subject-matter index of rules and orders issued or adopted after January 1, 1975.<sup>128</sup> However, the statute was amended,<sup>129</sup> and the 1975 starting date does not appear in the revised statute.<sup>130</sup> The court concluded that the legislature, recognizing the impossible burden that the 1975 starting date had imposed on many agencies, intended the effective date of the amended statute to be the new starting date of the required indices.<sup>131</sup> Consequently, Caserta could not escape discipline on that technicality.

*Claycomb v. Combs*.<sup>132</sup> Facing foreclosure, landowners listed two properties with a broker. No sale was produced even though the listing agreement was extended. The mortgagee foreclosed, took title, and then sold one property to the broker's father and mother. The mother just happened to be a real estate agent working for her son. The landowners (now former landowners) brought an action to have a constructive trust imposed on the

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123. *Id.* § 475.276(2).

124. FLA. STAT. § 475.278(2)(c) (1995), amended by 1997 Fla. Laws ch. 97-42.

125. 686 So. 2d 651 (Fla. 5th Dist. Ct. App. 1996).

126. *Id.* at 651.

127. *Id.* at 652-53.

128. *Id.* at 652 (citing FLA. STAT. § 120.53(2) (1991) (amended 1993)).

129. *Id.* (referring to FLA. STAT. § 120.53 (amended 1993)).

130. *Caserta*, 686 So. 2d at 652 (citing FLA. STAT. § 120.53 (amended 1993)).

131. *Id.* at 653.

132. 676 So. 2d 523 (Fla. 2d Dist. Ct. App. 1996).



property. The trial judge entered judgment on the pleadings for the broker's parents, but the district court reversed.<sup>133</sup>

Imposition of a constructive trust is an equitable remedy for the breach of a confidential relationship.<sup>134</sup> Consequently, "to survive a motion for judgment on the pleadings," the landowners' complaint would have to show that landowners had a confidential relationship with the broker's parents.<sup>135</sup> The court found that the combination of facts was sufficient to raise the inference that a confidential relationship might have existed.<sup>136</sup>

However, the court held that the landowners had not alleged that the foreclosure was in any way defective.<sup>137</sup> Therefore, their claim was that the property had been purchased, or should have been purchased, on their behalf. Before the landowners could prevail, they would have to tender to the parents the price that they had paid for the land. While the court does not explain further, this is merely an example of the old maxim, he who seeks equity must do equity.

*Cordis Corp. v. Baxter Healthcare Corp.*<sup>138</sup> A broker had the commercial lease listing for Cordis Corporation's property. The broker showed the property to Baxter, but Baxter's offer to lease a portion of the property was rejected. Cordis later exercised its option to terminate the listing agreement. Nine months later, Baxter approached Cordis through its own broker, and a lease for the entire property was arranged. That lease contained an indemnity clause that provided that each party to the lease promised "to indemnify and hold the other party harmless from and against any claims by any other broker, agent or other persons claiming a commission."<sup>139</sup>

The broker claimed that Cordis, after terminating the listing agreement, had "orally agreed to pay the broker a commission if it produced a prospect who purchased or leased" its property.<sup>140</sup> As a result, the broker had continued to prospect for buyers and lessees, including maintaining contact with Baxter. Consequently, after learning that Baxter had leased the property, broker sued Cordis for a brokerage commission. Cordis then sought indemnification from Baxter.<sup>141</sup> The trial court entered a judgment on the

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133. *Id.* at 524.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Claycomb*, 676 So. 2d at 525.

138. 678 So. 2d 847 (Fla. 3d Dist. Ct. App. 1996).

139. *Id.* at 848.

140. *Id.* at 847-48.

141. *Id.* at 848. Even though Cordis was ultimately held not liable for the broker's commission, Cordis still sought indemnification for the costs and attorneys' fees. *Id.*

pleadings in favor of Baxter and the district court affirmed.<sup>142</sup> The district court reasoned this was simply a case of interpreting the indemnification clause.<sup>143</sup> It noted that as a general proposition, an indemnity clause should be construed against the indemnitor if it is an incident of a contract not primarily concerned with indemnification, rather than an indemnification promise by one in the insurance business.<sup>144</sup> Furthermore, an indemnity clause will not be interpreted to provide a party indemnification for its own wrongful acts unless that intent is clearly and unequivocally expressed. The essence of the broker's claim was that Cordis had committed wrongful acts. Specifically, Cordis represented either expressly or impliedly, that it would pay a commission if the broker produced a tenant and accepted the benefits of that performance.<sup>145</sup> Both rules of interpretation lead to the conclusion that indemnification was not required. The court offered its opinion that the clause was really intended to provide protection from a surprise demand by a broker that one party did not know had been involved with the other party.<sup>146</sup> Certainly, that was not the case here.

*ERA Carico Real Estate Co. v. Manfredonia*.<sup>147</sup> The broker had won an action for a commission in county court, but on appeal to the circuit court that was reversed.<sup>148</sup> The district court, in turn, reversed and ordered the county court's judgment in favor of the broker reinstated.<sup>149</sup> The facts are that the broker was the one who first brought the property to the attention of the buyer. However, the buyer and seller negotiated directly. The circuit court held that because the buyer and seller did not "intentionally" exclude the broker from participating in the sale, the broker was precluded from recovering a commission.<sup>150</sup> According to the district court, the aforementioned holding was based upon a misreading of *Sheldon Green & Associates v. Rosinda Investments, N.V.*<sup>151</sup> Since the broker was the one who initially brought the parties together, he/she was the "procuring cause" and, as such, was entitled to his/her commission.<sup>152</sup>

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142. *Cordis Corp.*, 678 So. 2d at 847.

143. *Id.* at 848.

144. *Id.* (citations omitted).

145. *Id.*

146. *Id.* (citation omitted).

147. 689 So. 2d 1208 (Fla. 3d Dist. Ct. App. 1997).

148. *Id.* at 1208.

149. *Id.*

150. *Id.*

151. *Id.* at 1209 (citing *Sheldon Green & Assocs. v. Rosinda Invs., N.V.*, 475 So. 2d 925 (Fla. 3d Dist. Ct. App. 1985)).

152. *Manfredonia*, 689 So. 2d at 1209.

*Gimelstob Realty v. Sechrest Co.*<sup>153</sup> One broker sued another on a variety of tort theories because some of his/her associates left to work for the other firm. Both firms were members of the Realtor Association of Greater Fort Lauderdale whose rules required "arbitration of disputes 'arising out of the real estate business.'"<sup>154</sup> Therefore, the trial court held that this claim was subject to mandatory arbitration.<sup>155</sup> The fourth district, in a per curiam opinion that did not provide a detailed analysis, agreed that "this dispute between these realtors is within the meaning of that provision."<sup>156</sup>

*Waterfront Properties, Inc. v. Coast to Coast Real Estate, Inc.*<sup>157</sup> The majority of the panel issued a per curiam affirmance of the trial court's decision, but Judge Gross filed a dissenting opinion.<sup>158</sup> The dissent reveals that the listing broker continued to list the property in the multiple listing service, and one of its employees gave a brochure of the property to the selling broker after the listing had expired.<sup>159</sup> The selling broker showed its buyers the property, but when the buyers later met the seller, they were informed that the property was not then listed with any broker. The buyers then bought the property directly from the seller. Because neither broker had been paid a commission, they both sued.<sup>160</sup>

The trial court held that neither the seller nor the buyers were liable for a commission, but the broker with the expired listing was liable to the selling broker for the equivalent of a three percent commission.<sup>161</sup> The dissent argues that recovery could not be justified by any contract theory, including promissory estoppel.<sup>162</sup> This author<sup>163</sup> must disagree. Although promissory estoppel is often invoked as a consideration substitute, "promissory estoppel is an equitable principle that empowers a court to design a remedy avoiding injustice and achieving corrective justice between the parties in commercial transactions."<sup>164</sup> By listing the property in the multiple listing service or

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153. 676 So. 2d 83 (Fla. 4th Dist. Ct. App. 1996).

154. *Id.* at 83 (citations omitted).

155. *Id.*

156. *Id.*

157. 679 So. 2d 48 (Fla. 4th Dist. Ct. App. 1996).

158. *Id.* at 48 (Gross, J., dissenting).

159. *Id.*

160. *Id.*

161. *Id.*

162. *Waterfront Properties, Inc.*, 679 So. 2d at 49 (Gross, J., dissenting).

163. Professor Ronald Benton Brown.

164. Eric Mills Holmes, *Restatement of Promissory Estoppel*, 32 WILLAMETTE L. REV. 263, 363 (1966). See also *id.* at 360-67 (supplying a summary of the Florida law of promissory estoppel); Eric Mills Holmes, *The Four Phases of Promissory Estoppel*, 20 SEATTLE U. L. REV. 45 (1966).

handing out the property brochure, a listing broker invites other members of the multiple listing service to earn a share of the sales commission by producing a buyer. A listing broker has, both expressly and by his/her conduct, represented to the other brokers in the multiple listing service that he/she is in the position to fulfill that promise. Once the selling broker has in good faith relied to his/her detriment on that representation, the broker without a listing, e.g., one whose listing has expired, should be estopped from asserting that he/she did not receive the commission upon the sale. The critical elements should be that the "listing" broker knew, or should have known, that he/she did not have the power to perform that promise because he/she did not have a current listing, and that a selling broker who went through the effort of producing a buyer would suffer significant harm if there was no commission to share. Conversely, the selling broker could not reasonably be expected to inspect the listing agreement of each property he/she plans to show because it would be impractical for a broker planning a full day of showings to inspect all those documents, even if he/she were available. The dissent argues that allowing the selling broker to recover "is to base recovery on concepts of relative fault, a tort notion which was not pled."<sup>165</sup> However, that misses the point that fault is also an important concept in equity and that estoppel is an equitable doctrine.

*PK Ventures, Inc. v. Raymond James & Associates*,<sup>166</sup> *Wassall v. Payne*,<sup>167</sup> and *Woodson v. Martin*.<sup>168</sup> In *Woodson*, the buyer sued her real estate agent claiming she had misrepresented the house as being in good condition.<sup>169</sup> In a very brief opinion, which did not include a recitation of the facts, the Supreme Court of Florida addressed the following certified question:

IS THE BUYER OF RESIDENTIAL PROPERTY PREVENTED  
BY THE "ECONOMIC LOSS RULE" FROM RECOVERING  
DAMAGES FOR FRAUD IN THE INDUCEMENT AGAINST

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165. *Waterfront Properties, Inc.*, 679 So. 2d at 48-49.

166. 690 So. 2d 1296 (Fla. 1997).

167. 682 So. 2d 678 (Fla. 1st Dist. Ct. App. 1996).

168. 663 So. 2d 1327 (Fla. 2d Dist. Ct. App. 1995), *quashed by* 685 So. 2d 1240 (Fla. 1996).

169. *Id.* at 1327. Note that the facts reported here do not seem to match the certified question in *Woodson*, which assumes that the broker was the agent of the seller. *Woodson v. Martin*, 685 So. 2d 1240 (Fla. 1996). However, it does not seem that this will have any impact on use of this case as precedent.

THE REAL ESTATE AGENT AND ITS INDIVIDUAL AGENT  
REPRESENTING THE SELLERS?<sup>170</sup>

The unanimous answer was negative, based upon the reasoning provided in *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*,<sup>171</sup> which was decided at the same time. *HTP, Ltd.* dealt with a claim for damages based on the allegation that the party had been fraudulently induced to enter into a settlement agreement.<sup>172</sup> The district court denied the damage claim reasoning it was barred by the economic loss rule because it flowed from a contractual breach and was solely for economic losses.<sup>173</sup> The Supreme Court of Florida rejected this analysis.<sup>174</sup> It held that fraudulent inducement to enter into a contract was an independent tort, separate and distinct from any breach of contract.<sup>175</sup> In *HTP, Ltd.*, the supreme court specifically rejected the logic of the *Woodson* court, noting that Judge Altenbernd's dissent therein had been correct.<sup>176</sup>

These precedents should make brokers and sellers worry that they might be held accountable for the harm they could cause by misrepresenting property. Note that this case does not make either a broker or a seller an insurer of the property. The claimant must still prove the elements of fraud. But, it might have some salutary results. A recent news story on the effects of this case reported an interview with a broker who said that, "he has already alerted his sales people that, 'You don't lie, no matter what.'"<sup>177</sup> What a novel concept to introduce into real estate sales.

*HTP, LTD. v. Lineas Aereas Costarricenses, S.A.*<sup>178</sup> was also the basis for the decision in *Wassall v. Payne*.<sup>179</sup> Wassall had considered buying a particular property. He asked the owner and his broker whether the property was subject to flooding. Allegedly, their response was a misrepresentation. Wassall did not buy the property, but he eventually leased it from the person who did buy it. When flooding occurred, Wassall sued the seller and his broker alleging, *inter alia*, fraudulent and negligent

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170. *Woodson*, 685 So. 2d at 1241.

171. 685 So. 2d 1238 (Fla. 1996).

172. *Id.* at 1238-39.

173. *Woodson*, 663 So. 2d at 1329.

174. *Woodson*, 685 So. 2d at 1241.

175. *HTP, Ltd.*, 685 So. 2d at 1239.

176. *Id.* (quoting *Woodson v. Martin*, 663 So. 2d 1327, 1331 (Fla. 2d Dist. Ct. App. 1995) (Altenbernd, J., dissenting)).

177. Terry Sheridan, *New Legal Woes for Realty Agents*, BROWARD DAILY BUS. REV., Oct. 31, 1996, at 1.

178. 685 So. 2d 1238 (Fla. 1996).

179. 682 So. 2d 678 (Fla. 1st Dist. Ct. App. 1996).

misrepresentation. The trial court granted judgment on the pleadings for the defendants because the plaintiff was not in privity with them, but the First District Court of Appeal reversed.<sup>180</sup> Wassall's cause of action was not a breach of contract. His action was in tort, and privity was not an element of the tort. Consequently, if the seller and his broker made a misrepresentation to Wassall that was the proximate cause of his harm, they could be held liable.<sup>181</sup>

This trilogy was completed by *PK Ventures, Inc. v. Raymond James & Associates*.<sup>182</sup> That case involved the sale of commercial real estate rather than residential property. The Supreme Court of Florida specifically held that it did not matter whether the property was residential or commercial when damages were sought against a seller's broker for misrepresentation.<sup>183</sup> *Woodson* stood for the proposition that the economic loss rule could not be used to bar recovery for the independent tort of misrepresentation by the broker.<sup>184</sup>

#### IV. CONDOMINIUMS

*Carlandia Corp. v. Obernauer*.<sup>185</sup> The question before the court was whether section 718.1255 of the *Florida Statutes* requires nonbinding arbitration before suit can be filed for the stated causes of action.<sup>186</sup> Carlandia, as a unit owner, filed suit against the condominium association and the board of directors alleging construction defects existed in common areas subject to redress under warranty. The trial court granted the association's and the board's motion to dismiss the complaint for failing to conduct nonbinding arbitration prior to filing suit.<sup>187</sup>

This Fourth District Court of Appeal reversed because the complaint failed to reveal a "dispute" within section 718.1255(4)(a).<sup>188</sup> The statutory section mandates that the parties to a "dispute" submit to nonbinding

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180. *Id.* at 681.

181. *Id.*

182. 690 So. 2d 1296 (Fla. 1997). To be consistent, the Supreme Court of Florida subsequently quashed *Linn-Well Dev. Corp. v. Preston & Farley, Inc.*, 666 So. 2d 558 (Fla. 2d Dist. Ct. App. 1995). *Linn-Well Dev. Corp. v. Preston & Farley, Inc.*, 696 So. 2d 693 (Fla. 1997).

183. *PK Ventures, Inc.*, 690 So. 2d at 1296.

184. *Woodson*, 685 So. 2d at 1238.

185. 695 So. 2d 408 (Fla. 4th Dist. Ct. App. 1997).

186. *Id.* at 409.

187. *Id.*

188. *Id.* See FLA. STAT. § 718.1255(4)(a) (1992).

arbitration prior to court proceedings.<sup>189</sup> The statute also excludes any disagreement that “primarily involves . . . the interpretation or enforcement of any warranty” from the definition.<sup>190</sup> The statute expands the exclusion “to include those legal theories where application of a warranty is a critical element.”<sup>191</sup> The fourth district determined that this case falls within the statutory exclusion because the determination of the association’s statutory or fiduciary liability first requires a finding that there were actionable warranty violations on the common areas.<sup>192</sup>

Section 718.1255(3) of the *Florida Statutes* is designed to protect unit owners from the cost and time constraints involved when litigating with a condominium association.<sup>193</sup> Arbitration was not mandated for all condominium disputes.<sup>194</sup> Statutory nonbinding arbitration is designed to deal with day-to-day condominium disputes.<sup>195</sup> However, construction defect cases do not fit that category because of the factual and legal complexity involved.<sup>196</sup>

*Cricket Club Condominium, Inc. v. Stevens*.<sup>197</sup> Stevens filed a suit alleging misdeeds of the condominium association. The suit alleged all condominium residents were damaged by misrepresentations made in letters concerning the vote over a cable contract. The trial court certified the class without holding an evidentiary hearing.<sup>198</sup>

The Third District Court of Appeal only concerned itself with the trial court’s finding of adequacy of representation.<sup>199</sup> The third district concluded that the adequacy requirement of the rule can not be satisfied if Stevens is involved in other litigation against the Cricket Club.<sup>200</sup> At the time of this action, Stevens was involved in a counterclaim against the Cricket Club and another unit owner for intentional infliction of emotional distress.<sup>201</sup> If Stevens were to represent the class in this dispute, the best interests of that

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189. See FLA. STAT. § 718.1255(4) (1992).

190. *Carlandia Corp.*, 695 So. 2d at 409 (quoting FLA. STAT. § 718.1255(1) (1992)).

191. *Id.* at 410.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Carlandia Corp.*, 695 So. 2d at 410.

196. *Id.*

197. 695 So. 2d 826 (Fla. 3d Dist. Ct. App. 1997).

198. *Id.* at 827.

199. *Id.*

200. *Id.* at 827-28.

201. *Id.* at 827.

class must be Stevens' sole concern.<sup>202</sup> The third district reversed the trial court's determination of adequacy of representation.<sup>203</sup>

*Lambert v. Berkley South Condominium Ass'n.*<sup>204</sup> The question before the Fourth District Court of Appeal was whether the Association, or the individual owners of commercial units, should assume ownership and maintenance responsibility for a hallway located on the first floor of the condominium.<sup>205</sup> The Association argued that the hallway could not be considered a common element and was, therefore, not its responsibility because the required approval of all record unit owners to change the hallway's classification was not obtained. In response, Lambert contended that the "governing documents were ambiguous" and that the trial court was correct in considering the parties intent in determining that the hallway was converted to a common element.<sup>206</sup>

The fourth district determined the trial court improperly considered parol evidence in determining that the hallway was a common element.<sup>207</sup> It reasoned that parol evidence should only be addressed when the document is ambiguous on its face.<sup>208</sup> Ambiguity depends upon whether the document is subject to multiple interpretations. However, simply because the document is open to interpretation, does not mean the document is ambiguous. As long as the language is clear, a court cannot begin to interpret the plain meaning of the document.<sup>209</sup>

The condominium documents, taken as a whole, affirmatively state that the hallway was owned by the commercial unit owners as tenants in common. All units were labeled with the letter "C" to signify their unit, and the hallway itself was numbered "C-45" which revealed that the hallway was the last commercial unit.<sup>210</sup> In examining the documents and analyzing their plain meaning, it is obvious that no ambiguity existed. There is nothing in the documents that say the hallway is a common element. Rather, all documentary evidence showed that the hallway "is owned in common by each of the Commercial Condominium Unit Owners."<sup>211</sup> Parol evidence should not have been considered in this case since the document's language is

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202. *Cricket Club Condominium, Inc.*, 695 So. 2d at 827.

203. *Id.*

204. 680 So. 2d 588 (Fla. 4th Dist. Ct. App. 1996).

205. *Id.* at 590.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Lambert*, 680 So. 2d at 590.

210. *Id.*

211. *Id.* (quoting amendment to governing condominium documents).



facially clear. The trial court discovered ambiguity within the documents only after considering the extrinsic evidence introduced.<sup>212</sup>

Finally, when a subsequent amendment is made to the document which did not address the hallway, it cannot be assumed that the hallway would be considered a common element.<sup>213</sup> Section 718.110(4) of the *Florida Statutes* requires that all record unit owners must approve an amendment to the documents.<sup>214</sup> When the effort to amend is unsuccessful because not all unit owners approved it, the hallway can not be eliminated as a private unit and converted to a common element.<sup>215</sup>

*Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*<sup>216</sup> In this case the Supreme Court of Florida answered the following question certified by the Fourth District Court of Appeal:

WHETHER THE PROVISIONS OF SECTION 718.203(2), FLORIDA STATUTES (SUPP. 1992), IMPOSE ON A CONTRACTOR AN IMPLIED WARRANTY OF FITNESS FOR THE INTENDED USE AND PURPOSE WHERE THE CONTRACTOR WITHIN THE CONTEMPLATION OF THE CONTRACT DOCUMENTS SUGGESTS AND SUPPLIES A MANUFACTURED ITEM SUCH AS INDIVIDUAL AIR CONDITIONING UNITS TO A DEVELOPER FOR USE IN A BUILDING PROJECT, WHERE SUCH ITEMS LATER PROVE NOT TO BE FIT FOR THE SPECIFIC PURPOSE FOR WHICH THEY WERE SUPPLIED?<sup>217</sup>

The supreme court held that the warranty of fitness was not applicable, but under the provisions of section 718.203(2) the contractor does not warrant those items for a "specific purpose."<sup>218</sup>

Leisure Resorts was the developer of a twenty-two story condominium. Each unit was designed to include its own individual air conditioning unit with a condenser on the balcony; however, the design had a problem. Rooney was the air conditioning subcontractor and suggested the use of Tappan units. Tappan had represented that its units would work properly under the planned design. However, they did not work properly and

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212. *Id.*

213. *Id.* at 591.

214. *Lambert*, 680 So. 2d at 591 (citing FLA. STAT. § 718.110(4) (1995)).

215. *Id.*

216. 654 So. 2d 911 (Fla. 1995).

217. *Id.* at 912.

218. *Id.*

several unit owners brought a class action against Leisure Resorts alleging a variety of construction defects. Leisure sought indemnity from Rooney, after settling with the unit owners, alleging breach of warranty among other claims. The trial court held that pursuant to section 713.203(2), manufactured items for which there was a manufacturer's warranty were not within the scope of the definition of "materials supplied" as set forth in the statute, and that the subcontractor made no warranty of fitness.<sup>219</sup> The Supreme Court of Florida held that manufactured items are "materials" within the statute, and thus, a warranty by the subcontractor attached.<sup>220</sup>

However, the supreme court noted a distinction between the scope of the "developer's warranty mandated by section 718.203(1) and the contractor's warranty mandated under section 718.203(2)."<sup>221</sup> The developer warrants merchantability and fitness "for the purposes or uses intended."<sup>222</sup> The contractor, on the other hand, only warrants fitness "as to the work performed or material supplied," with no reference to fitness for intended purpose.<sup>223</sup> The supreme court remanded to the Fourth District Court of Appeal to decide: 1) whether the units were merely unfit for the specific purpose, in which case the contractor would not be liable; or 2) whether the units were unfit for ordinary purposes (unmerchantable), in which case the contractor would be liable.<sup>224</sup>

*National Title Insurance Co. v. Lakeshore 1 Condominium Ass'n.*<sup>225</sup> National was the owner of the first mortgage on two of the condominiums at Lakeshore 1 Condominium.<sup>226</sup> Association was obligated to purchase insurance "for the benefit of the Association, the Unit Owners and their respective mortgagees" to cover building and insurable improvements.<sup>227</sup> The mortgagees had no control over matters of insurance or reconstruction.<sup>228</sup>

As a result of Hurricane Andrew, Lakeshore 1 Condominium sustained damage which forced unit owners out of their homes. The Condominium insurer paid Association money for the damages and Association executed a contract with the construction company to make needed repairs. National's

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219. *Id.* at 913.

220. *Id.* at 914.

221. *Leisure Resorts, Inc.*, 654 So. 2d at 914.

222. *Id.* (emphasis removed).

223. *Id.* (emphasis removed).

224. *Id.* at 915.

225. 691 So. 2d 1104 (Fla. 3d Dist. Ct. App. 1997).

226. *Id.* at 1105.

227. *Id.* (quoting the Declaration of Condominium ¶ 14.1 (emphasis removed)).

228. *Id.*

mortgagors defaulted, and National foreclosed. Thereafter, National had acquired title to the damaged units and filed suit against Association seeking damages for dissipation of proceeds that National claimed an interest in. The trial court granted Association summary judgment and National appealed.<sup>229</sup>

The Third District Court of Appeal recognized that the first issue that had to be addressed was “whether the Association owed National a duty of reasonable care in managing the insurance proceeds.”<sup>230</sup> The third district held that Association owed National, a mortgagee, such a duty.<sup>231</sup> Association was managing insurance proceeds on behalf of the owners and mortgagees pursuant to the Declaration of Condominium of Lakeshore 1.<sup>232</sup>

The second issue was whether National was a member of the group to which Association owed a duty.<sup>233</sup> The court believed Association did owe a duty to National.<sup>234</sup> The terms of the Declaration of Condominium reflected that the unit owners’ rights were subject to mortgagee’s interest.<sup>235</sup> The insurance that the Association secured was to protect unit owners’ and mortgagees’ interests in the insured’s property. National did have “an interest in the insurance proceeds,” and “invasion of that interest was actionable.”<sup>236</sup>

*RIS Investment Group, Inc. v. Department of Business & Professional Regulation Division of Florida Land Sales Condominiums & Mobile Homes.*<sup>237</sup> The Fourth District Court of Appeal reversed an order requiring RIS to remit assessments to Indian Springs due on units owned from the date of recording of declaration through the date of unit sales and imposing civil penalty.<sup>238</sup> RIS was the developer of Briarwood Condominium. The Department issued a notice to show cause to RIS alleging that RIS, while controlling the association, failed to pay assessments due on developer owned units in violation of sections 718.116(1)(a) and 718.116(9)(a) of the *Florida*

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229. *Id.* at 1106.

230. *National Title Ins. Co.*, 691 So. 2d at 1106.

231. *Id.*

232. *Id.* at 1107.

233. *Id.*

234. *Id.*

235. *National Title Ins. Co.*, 691 So. 2d at 1107.

236. *Id.*

237. 695 So. 2d 357 (Fla. 4th Dist. Ct. App.), *opinion clarified*, 22 Fla. L. Weekly D721 (4th Dist. Ct. App. March 19, 1997), *review denied*, 698 So. 2d 839 (Fla. 1997).

238. *Id.* at 357.

*Statutes*.<sup>239</sup> After a hearing, the Department determined that RIS was liable for assessments from the date the declaration was recorded.<sup>240</sup>

The fourth district disagreed with the Department's conclusion.<sup>241</sup> The Department claimed that RIS was required to pay the assessments because of a provision in the RIS Declaration of Condominium.<sup>242</sup> The fourth district recognized that the Department failed to consider the definition of "unit" in the Condominium Act.<sup>243</sup> Section 718.103(24) of the *Florida Statutes* defines "unit" as "part of condominium property which is subject to exclusive ownership."<sup>244</sup> "A unit may be in improvements, land, or land and improvements together, as specified in the declaration."<sup>245</sup> The fourth district's previous opinion in *Welleby Condominium Ass'n One v. William Lyon Co.*<sup>246</sup> was controlling.<sup>247</sup> In *Welleby*, the developer prevailed because the land in question was neither "condominium units" as described in the Declaration of Condominium nor defined by the statute.<sup>248</sup>

The writer of the Declaration of Condominium for RIS could have defined a condominium unit in various ways. Although the definition of "condominium parcel" in *Welleby* was clearly defined, the definition of "unit" in this case was not.<sup>249</sup> However, it could still be discerned from the definition here that the term "unit" was not meant to encompass raw land.<sup>250</sup> Section 3.2 of the Declaration discusses the boundaries of a unit as "unfinished surface of the ceilings and floors, perimeter walls and any interior walls that are shown within the maximum limits of each unit on the plot plan."<sup>251</sup> This section indicates the intent not to include land within the definition of a unit.<sup>252</sup> Therefore, the court reversed the order requiring RIS to remit assessments.<sup>253</sup>

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239. *Id.* at 357-58.

240. *Id.* at 358.

241. *Id.*

242. *RIS Inv. Group*, 695 So. 2d at 358.

243. *Id.*

244. FLA. STAT. § 718.03(24) (1995).

245. *Id.*

246. 522 So. 2d 35 (Fla. 4th Dist. Ct. App. 1987).

247. *RIS Inv. Group*, 695 So. 2d at 358.

248. *Id.* at 358-59 (citing *Welleby Condominium Ass'n One, Inc. v. William Lyon Co.*, 522 So. 2d 35, 36 (Fla. 4th Dist. Ct. App. 1987)).

249. *Id.* at 359.

250. *Id.*

251. *Id.*

252. *RIS Inv. Group*, 695 So. 2d at 359.

253. *Id.* at 360.

## V. CONSTRUCTION

*Godwin v. United Southern Bank.*<sup>254</sup> Landowners were unhappy with the performance of their home construction contractor. Allegedly, the construction lender released the "final draw," i.e., the last installment of the construction loan, to the contractor without the landowner's endorsement. This was after the lender's construction inspector would not approve the final draw due to construction defects. As a result, the landowners sued their construction lender on a variety of theories. The trial court dismissed the complaint, and the Fifth District Court of Appeal affirmed on all counts except the count claiming a breach of the construction loan.<sup>255</sup>

The loan agreement provided that "construction shall not be deemed complete for purposes of final disbursement unless and until Lender shall have received all of the following: . . . . Acceptance of the completed improvements by Lender and Borrower."<sup>256</sup> The fifth district concluded that the factual allegations were sufficient to allege that the final disbursement had been made without acceptance by either.<sup>257</sup> Judge Dauksch dissented, pointing out that an additional provision of the contract appeared to give the lender total control over the decision to make any payments to the contractor.<sup>258</sup> The dissent failed to explain the theory of contract interpretation and apparently chose to ignore the rules of construction that a contract should be interpreted against its drafter, most likely the lender, and that no part of a contract should be interpreted so as to make another part meaningless.<sup>259</sup> The dissent's interpretation would certainly make the provision on final disbursement, which the majority relied upon, totally meaningless.

*Island House Developers, Inc. v. AMAC Construction, Inc.*<sup>260</sup> In a dispute over a construction contract, the issue raised was whether the general contractor had a valid license. The trial court granted the contractor's motion to compel arbitration pursuant to an arbitration clause in the contract.<sup>261</sup> However, under Florida law, the construction contract, including the arbitration clause, could not be enforced by an unlicensed contractor.<sup>262</sup>

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254. 688 So. 2d 373 (Fla. 5th Dist. Ct. App. 1997).

255. *Id.* at 374.

256. *Id.*

257. *Id.*

258. *Godwin*, 688 So. 2d at 374-75 (Dauksch, J., dissenting).

259. *Id.*

260. 686 So. 2d 1377 (Fla. 1st Dist. Ct. App. 1997).

261. *Id.*

262. See FLA. STAT. § 489.128 (1995).

Consequently, the motion should not have been ruled upon until the court had determined that there was a valid and enforceable contract.<sup>263</sup>

*Mercedes Homes, Inc. v. Osborne.*<sup>264</sup> The owners and builder entered into a contract for the construction of a home in Hillsborough County. Before the owners were to take possession, the parties entered into a presettlement agreement which provided that the builder would replace certain ceramic tile.

When disagreements arose between the parties, the owners filed suit. The complaint contained three counts based on the following: 1) the builder breached its express one-year warranty by failing to correct the defective ceramic tile; 2) the builder had breached the pre-settlement agreement to replace the tile; and 3) the builder had negligently failed to obtain the extended third party warranty for which the owners had previously paid. The contract provided that venue for any action “arising herein or related hereto”<sup>265</sup> would be in Brevard County, but the complaint was filed in Hillsborough County. The builder’s motion challenging the venue was denied, and the builder appealed.<sup>266</sup>

The Second District Court of Appeal noted that “parties to an agreement may provide therein where an action must be brought to enforce it.”<sup>267</sup> The trial court accepted the landowner’s argument that the second count arose out of the presettlement agreement, rather than the construction contract containing the venue provision.<sup>268</sup> Thus, the second count had proper venue in Hillsborough County. Applying section 47.041 of the *Florida Statutes* would allow the other counts to stay in Hillsborough County along with count two.<sup>269</sup> The second district rejected this logic and reversed.<sup>270</sup> It concluded that the venue provision had not been eliminated by the subsequent presettlement agreement, i.e., it was not a novation.<sup>271</sup> Furthermore, the venue provision included an action to enforce the presettlement agreement because that was a modification of the rights and responsibilities of the parties under that contract.<sup>272</sup> Since all three counts were within the scope of the valid

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263. *Island House Developers, Inc.*, 686 So. 2d at 1377.

264. 687 So. 2d 840 (Fla. 2d Dist. Ct. App. 1996).

265. *Id.* at 840 (quoting the contract).

266. *Id.* at 841.

267. *Id.* (citing *Southeastern Office Supply & Furniture Co. v. Barley*, 427 So. 2d 1139 (Fla. 5th Dist. Ct. App. 1983)).

268. *Id.*

269. *Osborne*, 687 So. 2d at 841 (citing FLA. STAT. § 47.041 (1993)).

270. *Id.*

271. *Id.*

272. *Id.*

venue agreement, the second district never reached the question regarding the effect of section 47.041.<sup>273</sup>

## VI. CONTRACTS

*Holiday Pines Property Owners Ass'n, Inc. v. Rowen.*<sup>274</sup> The Fourth District Court of Appeal "reverse[d] the final judgment in favor of the owners in this action by a homeowners association to enforce restrictive covenants."<sup>275</sup> The fourth district, in reversing final judgment, concluded that the voluntary homeowners "association lacked standing to bring the action."<sup>276</sup> The association must either be "the assignee of the developer's right to enforce the restrictive covenants or the direct successor of the developer's interest" in order to have the requisite standing.<sup>277</sup> Neither is true in this case. In addition, there were no provisions allowing the association to seek judicial enforcement of the covenants.<sup>278</sup>

*Oceania Joint Venture v. Trillium, Inc.*<sup>279</sup> The issue before the court was "whether, under the mortgage contingency in the purchase contract, Meretsky was entitled to return of the deposit."<sup>280</sup> Meretsky entered into a contract and placed a deposit to purchase a unit at the Oceania III Condominium. A separate document executed granted Meretsky the right to take title in the name of a corporation if he was a principal of the corporation. The seller was obligated to inform Meretsky when the condominium neared completion while Meretsky, in turn, was obligated to make a mortgage application. The agreement to purchase was contingent on Meretsky obtaining a mortgage for the price of the unit less the deposit amount. If Meretsky could not obtain the mortgage, the seller had to grant the loan itself or allow Meretsky to rescind on his purchase agreement and receive back his \$55,400 deposit.<sup>281</sup>

When it was time for Meretsky to obtain the mortgage, he informed the Great Western Bank that he wanted to take title to the condominium unit. The unit would be the only asset of Meretsky's corporation. Great Western was willing to grant Meretsky an individual loan, but not the type of corporate

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273. *Id.*

274. 679 So. 2d 824 (Fla. 4th Dist. Ct. App. 1996).

275. *Id.* at 825.

276. *Id.*

277. *Id.* (citing *Palm Point Property Owners' Ass'n v. Pisarski*, 626 So. 2d 195 (Fla. 1993)).

278. *Id.* at 824.

279. 681 So. 2d 881 (Fla. 3d Dist. Ct. App. 1996).

280. *Id.* at 882.

281. *Id.*

loan he desired. However, Flagler Federal Savings and Loan would grant the loan only if Meretsky gave a personal guarantee. Meretsky failed to secure a loan from any of the institutions he questioned. Needless to say, the seller claimed that Meretsky failed to satisfy his obligations under the mortgage contingency, explaining that Meretsky's only options were to forfeit the deposit or proceed to closing on the condominium unit.<sup>282</sup>

The seller then proceeded to set a closing date at which Meretsky would not close, thus, the seller kept the \$55,400 deposit. Consequently, Meretsky brought suit for the return of the deposit. The trial court found for Meretsky, agreeing that Meretsky complied with the mortgage contingency.<sup>283</sup> The Third District Court of Appeal reversed the final judgment and remanded for further proceedings.<sup>284</sup> The court reasoned that once Meretsky failed to supply the personal guarantee which Flagler Federal required to secure the corporate mortgage loan, he failed to comply with the contingency agreement.<sup>285</sup>

*Rubell v. Finkelstein.*<sup>286</sup> The question before Third District Court of Appeal was whether the contract agreement for the sale and purchase of real property merged into the deed.<sup>287</sup> Rubell, "Buyer," entered into a contract that was for the sale and purchase of real property that was encumbered by existing leases. Finkelstein, "Seller," was to furnish Buyer with copies of those existing leases. After Buyer received the copies, he then had the option to accept or terminate the contract. The contract also stated that Buyer had to approve any new lease into which Seller wished to enter prior to the closing date. Seller executed a new lease without obtaining Buyer's approval. After Seller and Buyer closed on the property, Buyer sought a release from the unauthorized lease and filed suit to recover damages.<sup>288</sup>

The third district reversed the final judgment entered in favor of Seller.<sup>289</sup> As a general rule, "the acceptance of a deed tendered in performance of a contract to convey land merges or extinguishes the preliminary agreements and understandings contained within the contract."<sup>290</sup>

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282. *Id.* at 883.

283. *Id.*

284. *Oceania Joint Venture*, 681 So. 2d at 885.

285. *Id.* at 883.

286. 679 So. 2d 889 (Fla. 3d Dist. Ct. App. 1996).

287. *Id.* at 889.

288. *Id.*

289. *Id.* at 890.

290. *Id.* at 889 (citations omitted).



However, this accepted rule does not apply to provisions of the sale contract not intended to be extinguished or merged into the deed.<sup>291</sup>

In this case, the contract between Buyer and Seller contained a provision which stated that Seller must reveal all leases.<sup>292</sup> Those leases revealed must be the only agreements or understandings pertaining to the property. The contract also expressly provided that “representations and warranties made by the Seller . . . shall survive closing.”<sup>293</sup> Since the new lease breached the contract between Seller and Buyer, the trial court erred in applying the merger rule in this situation.<sup>294</sup>

*Whitehurst v. Camp*.<sup>295</sup> The First District Court of Appeal affirmed the trial court’s finding that the statutory rate computed by the state comptroller should be applied when awarding post-judgment interest.<sup>296</sup> Whitehurst appealed the lower court’s final summary judgment which foreclosed upon deeded property.<sup>297</sup> The property at issue was real and personal property over which the Camps and Whitehursts entered into a deed agreement. The agreement provided that the Camps would pay the Whitehursts \$450,000 “with interest at the rate of 10 per centum (10%) per annum payable on the whole sum remaining from time to time unpaid.”<sup>298</sup> The agreement contained no provision governing the payment of interest on any judgment entered pursuant to the agreement.<sup>299</sup>

Section 55.03(1) of the *Florida Statutes* allows the parties to set the rate of post-judgment interest by contract.<sup>300</sup> However, the agreement here only set the rate of interest for the debt and did not govern the rate of post-judgment interest. The parties must expressly state in the contract that the decided interest rate is meant to govern post-judgment interest as well. If not expressly stated, upon entry of a judgment, the lender can no longer charge the interest designated by contract but is obligated to charge the amount specified by statute.<sup>301</sup> Since the terms of the agreement here between

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291. *Rubell*, 679 So. 2d at 889 (citations omitted).

292. *Id.* at 890.

293. *Id.* (quoting the contract).

294. *Id.*

295. 677 So. 2d 1361 (Fla. 1st Dist. Ct. App. 1996), *review granted*, 687 So. 2d 1308 (Fla.), *approved in part*, 699 So. 2d 679 (Fla. 1997).

296. *Id.* at 1362.

297. *Id.*

298. *Id.* (quoting the agreement).

299. *Id.*

300. *Whitehurst*, 677 So. 2d at 1362.

301. *Id.* at 1363. *See Sciandra v. First Union Nat’l Bank*, 638 So. 2d 1009, 1010 (Fla. 2d Dist. Ct. App. 1994) (Altenbernd, J., concurring).

Whitehurst and Camp were not specific to address post-judgment interest, the eight percent statutory rate should apply.<sup>302</sup>

## VII. COVENANTS, DEEDS, AND RESTRICTIONS

*Mann v. Mann.*<sup>303</sup> The question before this court was “whether the deed at issue effectively transferred a joint interest in the home to Former Husband and Former Wife.”<sup>304</sup> The First District Court of Appeal reversed and remanded the trial court’s decision that the parties owned the home as tenants in common.<sup>305</sup>

In 1989, Former Husband and his first wife, who is not the Former Wife in this litigation, deeded property to Former Husband’s mother. The mother never recorded. In 1993, Former Wife altered the deed by “whiting out” the Former Husband’s mother’s name as grantee and replacing it with the parties’ names. The Former Wife alleged that the changes to the deed were made with the consent of Former Husband, his mother, and his sister. On the other hand, Former Husband claimed that the changes to the deed were made without his consent. Former Husband alleged that Former Wife’s intent was to obtain a joint interest in the property.<sup>306</sup> Under either version of the story, the altered deed did not convey any joint interest in the property to the parties represented in this action.<sup>307</sup> Presently, the title to the property may belong to Former Husband’s mother, who was not a party of the divorce proceedings; thus, the property does not fall under the court’s jurisdiction.<sup>308</sup>

*Stev-Mar, Inc. v. Matvejs.*<sup>309</sup> The Third District Court of Appeal reversed an adverse summary final judgment in favor of Matvejs.<sup>310</sup> Matvejs divided her piece of property in two, whereby she had her home on one half and listed the vacant half for sale as a homesite. Real estate agents placed an ad to sell the vacant property. Stev-Mar was interested in buying the land for a retirement home. The agent told Stev-Mar that the property was zoned and platted for a single family home. Consequently, Stev-Mar entered into a contract to buy the land. Although Stev-Mar was to take title subject to

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302. *Whitehurst*, 677 So. 2d at 1363.

303. 677 So. 2d 62 (Fla. 1st Dist. Ct. App. 1996).

304. *Id.* at 62.

305. *Id.* at 63.

306. *Id.* at 62-63.

307. *Id.* at 63.

308. *Mann*, 677 So. 2d at 63.

309. 678 So. 2d 834 (Fla. 3d Dist. Ct. App. 1996), *review denied sub nom.* Carico Real Estate Co. v. Stev-Mar, Inc., 686 So. 2d 576 (Fla. 1996).

310. *Id.* at 835.

certain restrictions, nothing in the contract prevented the “use of [r]eal [p]roperty for residential purposes.”<sup>311</sup> In addition, Stev-Mar’s attorney verified that the area zoning permitted the building of a single family residence.<sup>312</sup>

When the seller delivered the general warranty deed to Stev-Mar, the deed did not have the required disclosure statement which advises the buyer that “under the Monroe County Land Development Regulations the division of land into parcels of land [which] are not approved as platted lots under the regulations confers no right to develop a parcel of land for any purpose.”<sup>313</sup> Later on, Stev-Mar discovered that the property was not properly replatted or subdivided and could not be legally used for its desired purpose.<sup>314</sup> Stev-Mar brought suit against the owner, real estate agent, and real estate agency for intentional fraud and negligent misrepresentation.<sup>315</sup> The trial court held for Matvejs, stating that Stev-Mar hired an attorney to investigate the property and did not rely on the representations of Matvejs.<sup>316</sup>

The third district reversed the trial court’s decision.<sup>317</sup> The court relied on the decision in *Besett v. Basnett*.<sup>318</sup> In *Basnett*, the Supreme Court of Florida held that a recipient of a fraudulent misrepresentation may rely on the truth of such representation, even though its falsity could have been discovered through investigation, unless he knows, or it is obvious to him, that the representation is false.<sup>319</sup> In this case, the seller misrepresented the land as properly platted for use as a homesite. Stev-Mar entered a contract based on that misrepresentation. In addition, Stev-Mar’s attorney was negligent in his investigation of the land because he failed to investigate beyond zoning. The attorney never discovered that the property had not been replatted.<sup>320</sup>

The question is whether Matvejs avoids liability just because Stev-Mar’s attorney conducted a negligent investigation. The district court recognized that even though Stev-Mar’s attorney was negligent, the seller, real estate agent, and real estate agency cannot avoid the intentional fraud charge.<sup>321</sup>

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311. *Id.* at 835-36 (quoting the contract).

312. *Id.* at 836.

313. *Id.* (quoting the contract).

314. *Matvejs*, 678 So. 2d at 836.

315. *Id.*

316. *Id.*

317. *Id.* at 839.

318. *Id.* at 837 (citing *Besett v. Basnett*, 389 So. 2d 995 (Fla. 1980)).

319. *Besett v. Basnett*, 389 So. 2d 995, 998 (Fla. 1980).

320. *Matvejs*, 678 So. 2d at 837.

321. *Id.*

“‘[T]he law should not permit an inattentive person to suffer loss at the hands of a misrepresenter.’”<sup>322</sup>

### VIII. EASEMENTS

*Nerbonne, N. V. v. Florida Power Corp.*<sup>323</sup> The issue before the Fifth District Court of Appeal was:

Whether Orange County’s grant of a permit to Florida Power Corporation in 1991 to construct a power line over an easement deeded to the County in 1952 and the subsequent erection of the power line exceeded the scope of the grant of easement to the County and, thus, constituted a taking of Nerbonne’s property.<sup>324</sup>

The “Right-of-Way Agreement” in question provided that in exchange for one dollar, the Florida Power Corporation would be given “‘a right-of-way for public road purposes and full authority to enter upon, . . . TO HAVE AND TO HOLD the said easement.’”<sup>325</sup>

Florida has not directly decided this issue, but the majority of courts in other jurisdictions have concluded that the construction of a power line, which did not interfere with highway travel, was a proper use of a highway easement.<sup>326</sup> It “‘is not regarded as imposing an additional burden or servitude on the underlying estate.’”<sup>327</sup> When looking to other cases such as *Fisher v. Golden Valley Electric Ass’n*,<sup>328</sup> the reasoning appeared consistent with Florida cases that have considered the scope of a public road right-of-way.<sup>329</sup> Since the document failed to exclude public utilities from the easement, the court construed the grant of a right-of-way to include such utilities.<sup>330</sup>

*State Department of Transportation v. B & C Foods, Inc.*<sup>331</sup> The Fourth District Court of Appeal affirmed the lower court’s decision ordering the City of Fort Lauderdale to reconvey an easement to McDonald’s Corporation

322. *Id.* at 837-38 (citing *Besett v. Basnett*, 389 So. 2d 995, 998 (Fla. 1980)).

323. 692 So. 2d 928 (Fla. 5th Dist. Ct. App. 1997).

324. *Id.* at 928.

325. *Id.* (quoting the agreement).

326. *Id.* at 929 (citations omitted).

327. *Id.* (citations omitted).

328. 658 P.2d 127 (Alaska 1983).

329. *Nerbonne*, 692 So. 2d at 930 (citing *Dickson v. St. Lucie County*, 67 So. 2d 662, 665 (Fla. 1953)).

330. *Id.*

331. 687 So. 2d 4 (Fla. 4th Dist. Ct. App. 1996).

according to section 255.22 of the *Florida Statutes*.<sup>332</sup> The language in the 1979 easement stated that the easement was for “right[-]of[-]way purposes.”<sup>333</sup> This purpose was for a “specified purpose or use” which was intended to be addressed under subsection (3) of the *Florida Statutes*.<sup>334</sup> Fort Lauderdale did not use or identify the easement in a comprehensive plan of its own within ten years of the conveyance date.<sup>335</sup> Since subsection (1) required the transferee to identify the property as such in the comprehensive plan, the Department of Transportation could not rely on Broward County’s comprehensive plan as a way around subsection (3).<sup>336</sup>

## IX. EMINENT DOMAIN

### A. Condemnation

*Broward County v. LaPointe*.<sup>337</sup> The Fourth District Court of Appeal ruled that where a researcher had been hired as both an expert witness and as a litigation consultant, it was error to award an expert witness fee for all of the researcher’s time.<sup>338</sup> “On remand, the trial court must determine what portion of [his] fee can be allocated to the formation of an expert opinion which related to the valuation of the property.”<sup>339</sup> The condemnor can be required to pay only that portion of his bill.

*Department of Transportation v. Springs Land Investments, Ltd.*<sup>340</sup> To effectuate its comprehensive plan, the city was planning on down-zoning an area that included this owner’s land. Since that “would have significantly reduced the property’s market value,” the landowner took the steps necessary to have the commercial zoning vest so it would survive a general re-zoning of the area, primarily by hiring an engineering firm to acquire the city’s preliminary site plan approval for a shopping center.<sup>341</sup> Then, the Department of Transportation began this condemnation proceeding which was eventually

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332. *Id.* at 5. See FLA. STAT. § 255.22(1) (1994).

333. *B & C Foods, Inc.*, 687 So. 2d at 5.

334. *Id.*

335. *Id.*

336. *Id.*

337. 685 So. 2d 889 (Fla. 4th Dist. Ct. App. 1996). For more discussion of this case, see also the Attorneys’ Fees section of this survey.

338. *Id.* at 893.

339. *Id.*

340. 695 So. 2d 414 (Fla. 5th Dist. Ct. App. 1997).

341. *Id.* at 416.

settled. Subsequently, when the condemnee filed a motion to tax costs, it included the engineering firm's fees.<sup>342</sup>

The Fifth District Court of Appeal held that those fees should not have been allowed.<sup>343</sup> Section 73.091 of the *Florida Statutes* provides for "all reasonable costs" of the condemnation proceeding.<sup>344</sup> Here, however, the fees were incurred to maintain the value of the property by avoiding down-zoning, not to litigate the condemnation. It would seem like double compensation if this landowner was compensated for the land with the commercial zoning in order to pay for both the land with the more valuable zoning and to pay the fees to get that zoning.

*Garber v. State Department of Transportation*.<sup>345</sup> Following a stipulated judgment, the trial court entered an order on attorneys' fees and costs pursuant to section 73.091 of the *Florida Statutes*.<sup>346</sup> However, the trial court denied expert witness fees for the condemnee's marketing expert who was a real estate broker engaged "to help assess the impact a loss of parking places would have on the property's continued viability as the location of three physicians' practices."<sup>347</sup> The First District Court of Appeal ruled "that the trial court erred in categorically rejecting" an expert witness fee for the marketing expert.<sup>348</sup> Neither the plain language of the statute nor the decision in *State Department of Transportation v. Woods*<sup>349</sup> precluded expert witness fees for a marketing expert.<sup>350</sup> The latter denied fees for an expert that the fourth district concluded had assisted the condemnee's lawyer in the litigation rather than act as an expert witness.<sup>351</sup> However, this trial court had made no similar finding of facts that this expert was not hired "as a witness to render or assist in rendering an opinion on just valuation and to testify, as needed."<sup>352</sup> If this person had done what the condemnee claimed, then an expert witness fee would have been appropriate. Furthermore, it must not be duplicative, and it must be necessary to the presentation of the condemnee's case.

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342. *Id.*

343. *Id.* at 415.

344. FLA. STAT. § 73.091 (1993).

345. 687 So. 2d 2 (Fla. 1st Dist. Ct. App. 1996).

346. *Id.* at 3.

347. *Id.* at 4.

348. *Id.*

349. 633 So. 2d 94 (Fla. 4th Dist. Ct. App. 1994).

350. *Garber*, 687 So. 2d at 4.

351. *Id.* (citing *Department of Transp. v. Woods*, 633 So. 2d 94, 95 (Fla. 4th Dist. Ct. App. 1994)).

352. *Id.*

*M & C Associates v. State Department of Transportation.*<sup>353</sup> Mediation produced a settlement agreement that was incorporated into a stipulated final judgment. One provision was “that the trial court would ‘reserve jurisdiction to assess any damage’” caused to the landowner’s pool by the Department’s construction.<sup>354</sup> However, the trial court later denied the landowner’s motion to enforce this provision “on the basis that construction damages are not recoverable in an eminent domain proceeding.”<sup>355</sup> The second district reversed, noting that “[t]here is no requirement that the terms of a settlement agreement be confined to issues cognizable in the litigation giving rise to the dispute.”<sup>356</sup> The court held that the rights and obligations of the parties merged into the settlement agreement.<sup>357</sup> Consequently, the agreement was binding on the parties and the trial court.<sup>358</sup> From the limited facts given, it appears that the Department’s conduct was outrageous, but the opinion is a monument of judicial restraint, simply stating the law and the results without casting aspersions on the Department’s actions.

*Murray v. Department of Transportation.*<sup>359</sup> The Department of Transportation took sixteen parking spaces from a restaurant parking lot. The restaurateur sought both business and severance damages under the statute in addition to compensation for the land. The issue on appeal centered on proof of the business damages. The trial court admitted the testimony of the restaurateur’s expert, which stated:

[He had] calculated a projected loss of sales resulting from the lost parking spaces and deducted from that sales amount the business costs which, in his opinion, would have been attributed to production of those sales had the sales not been lost. The expert then capitalized the recurring shortfall and concluded that the capitalized amount would be the loss to the ongoing business.<sup>360</sup>

The first district reversed, ruling that the expert’s testimony was inadmissible as a matter of law because it did not deduct a percentage of all fixed costs

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353. 682 So. 2d 640 (Fla. 2d Dist. Ct. App. 1996).

354. *Id.* at 640.

355. *Id.*

356. *Id.*

357. *Id.*

358. *M & C Assocs.*, 682 So. 2d at 640.

359. 687 So. 2d 825 (Fla. 1997).

360. *Id.* at 825.

from the sales amount.<sup>361</sup> The first district then certified two questions.<sup>362</sup> The first was whether:

IN AN EMINENT DOMAIN CASE IN WHICH AN ESTABLISHED BUSINESS IS NOT TOTALLY DESTROYED BY A TAKING, DOES SECTION 73.071(3)(B), FLORIDA STATUTES [(1991)], CONTEMPLATE CALCULATION OF BUSINESS DAMAGES BY ANY MEANS OTHER THAN A LOST PROFIT ANALYSIS?<sup>363</sup>

The Supreme Court of Florida declined to answer this question, reasoning that all the experts in this case had used a lost profit analysis.<sup>364</sup> However, the Supreme Court of Florida directed its attention to the second certified question which was:

IN THE INSTANT CASE IS THE EXPERT'S BUSINESS DAMAGE CALCULATION A LOST PROFIT ANALYSIS REQUIRING THE DEDUCTION OF FIXED EXPENSES, SUCH AS SALARIES, INTEREST, DEPRECIATION, AND UTILITIES, OR AN ALTERNATIVE ANALYSIS, COGNIZABLE UNDER SECTION 73.071(3)(b) [FLORIDA STATUTES (1991)], BASED ON DEDUCTION OF CERTAIN VARIABLE EXPENSES AND THE EXCLUSION OF FIXED EXPENSES FROM THE ANALYSIS?<sup>365</sup>

The supreme court answered that "a business-loss calculation based on certain variable expenses and excluding some fixed expenses can be cognizable under section 73.071(3)(b), depending upon the factual circumstances of a particular case."<sup>366</sup> The unanimous opinion written by Justice Wells noted that business damages are related to lost profits, but they are not limited to lost profits.<sup>367</sup> The supreme court rejected a "mechanically applied, one-size-fits-all formula."<sup>368</sup> It would have been error not to deduct managerial salaries in the amount deducted from sales in a case where the business had closed as a

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361. *State Dep't of Transp. v. Murray*, 670 So. 2d 977, 980 (Fla. 1st Dist. Ct. App. 1996), *quashed by* *Murray v. State Dep't of Transp.*, 687 So. 2d 825 (Fla. 1997).

362. *Id.* at 980.

363. *Id.*

364. *Murray*, 687 So. 2d at 826.

365. *Id.* at 825-26.

366. *Id.* at 826.

367. *Id.*

368. *Id.* at 827.



result of the taking.<sup>369</sup> However, in this case the business did not close. In the case at hand, it was a question of fact as to which fixed expenses should be included in the calculation because it was not certain that managerial expenses would be reduced by the decreased trade that the restaurant would suffer from the loss of parking spaces. Both sides had presented expert testimony on that issue. Therefore, the trial court did not abuse its discretion by admitting this testimony.<sup>370</sup>

*Trinity Temple Church of God in Christ, Inc. v. Orange County.*<sup>371</sup> Part of the church's property was taken, and the church sought, *inter alia*, statutory business damages.<sup>372</sup> The courts did not hesitate to grant severance damages, but the trial court rejected the business damage claim, and the fifth district agreed.<sup>373</sup> First, the court concluded that a tax-exempt church was not a business within the meaning of the statute.<sup>374</sup> The court noted that the statute is to be "strictly construed."<sup>375</sup> The dictionary definition of a business is one that involved an "activity engaged in for a gain or livelihood,"<sup>376</sup> but, the statute providing the church tax-exempt status requires that the church be used "predominately for a . . . religious . . . purpose."<sup>377</sup> The court also rejected the church's equal protection argument by primarily relying on the difficulty in calculating business damages for something that was not a business and already was getting preferential tax treatment.<sup>378</sup>

*Trump Enterprises, Inc. v. Publix Supermarkets, Inc.*<sup>379</sup> The lease for an unimproved outparcel in a shopping center did not contain a condemnation clause. A restaurant was built on the parcel, and thereafter, almost thirty-five percent of the parcel was taken for road widening. Although the lessee presented un rebutted expert testimony as to the value of the leasehold taken, the trial court held that the lessee was not entitled to a portion of the condemnation award.<sup>380</sup> It reasoned that the lessee had suffered no harm because the land taken was part of the grassy strip running along the road.<sup>381</sup>

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369. *Murray*, 687 So. 2d at 827 (distinguishing *Department of Transp. v. Manoli*, 645 So. 2d 1093 (Fla. 4th Dist. Ct. App. 1994)).

370. *Id.*

371. 681 So. 2d 765 (Fla. 5th Dist. Ct. App. 1996).

372. *Id.* at 766. See also FLA. STAT. § 73.071(3)(b) (1995).

373. *Trinity Temple*, 681 So. 2d at 766.

374. *Id.*

375. *Id.*

376. *Id.* (quoting BLACK'S LAW DICTIONARY 198 (6th ed. 1990)).

377. *Id.* (quoting FLA. STAT. § 196.196(1) (1995)).

378. *Trinity Temple*, 681 So. 2d at 766.

379. 682 So. 2d 168 (Fla. 4th Dist. Ct. App. 1996).

380. *Id.* at 168.

381. *Id.* at 170.

Therefore, the restaurant building was not disturbed because it had lost no parking spaces and its business was not affected.<sup>382</sup> The Fourth District Court of Appeal disagreed and reversed.<sup>383</sup>

The right to compensation for a governmental taking is not a matter of damages in the contract or tort sense. A leasehold is an interest in land for purposes of taking jurisprudence. When a fee simple subject to a lease is taken, the lessee is entitled to share in the condemnation award as compensation for the interest lost. The lessee's share should be proportionate to the value of the leasehold in relation to the value of the fee simple taken. Consequently, this lessee's share in the condemnation award should be the decrease in the value of its leasehold, which its expert had figured from the proportionate loss of area minus the value of the landlord's reversion.<sup>384</sup>

The lack of a condemnation clause in the lease did not defeat the lessee's right to compensation. Quite the contrary, when a lease is silent about condemnation, the lessee is entitled to compensation for its lost leasehold interest. The court pointed out in dicta that condemnation clauses limiting a tenant's right to compensation for a governmental taking are disfavored and should, therefore, be construed, whenever possible, not to defeat a tenant's right to compensation.<sup>385</sup>

#### B. *Inverse Condemnation*

*Department of Environmental Protection v. Gibbins.*<sup>386</sup> The landowner's neighbor operated a service station which discharged gasoline from underground storage tanks. To define the extent of the contamination, the Department of Environmental Protection notified the landowner that it wanted to drill several wells on the landowner's property. The landowner resisted, demanding compensation; thus, the Department served him with an administrative order for access. After the landowner responded with a demand for a formal hearing, the Department withdrew its administrative action and filed a complaint seeking an injunction against the landowner for interfering with the installation of wells on his land. The Department then decided that was unnecessary and moved for voluntary dismissal; however, the landowner filed a motion for attorney's fees on the theory that he had

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382. *Id.*

383. *Id.*

384. *Trump*, 682 So. 2d at 170.

385. *Id.* (relying on *Mullis v. Division of Admin.*, 390 So. 2d 473 (Fla. 5th Dist. Ct. App. 1980)).

386. 696 So. 2d 888 (Fla. 5th Dist. Ct. of App. 1997).

defeated an attempt by the government to take his land. The trial court agreed and awarded substantial attorney's fees.<sup>387</sup>

The fifth district reversed.<sup>388</sup> Its analysis does not address whether the Department's conduct amounted to an "inverse condemnation" or whether attorney's fees can be awarded in an inverse condemnation case, although the court disagreed with the landowner's contention that the "DEP's action, whether deliberate or inadvertent, was highly intrusive behavior, and hence a taking."<sup>389</sup> Rather, the fifth district reasoned that because no condemnation proceeding had begun, the landowner could not have succeeded in defeating a condemnation attempt.<sup>390</sup> As the statutes relied upon only provide for attorney's fees in condemnation proceedings,<sup>391</sup> there would be no basis for awarding attorney's fees in this case.<sup>392</sup>

*Diamond K Corp. v. Leon County.*<sup>393</sup> A creek crossed a corner of Diamond K's property. The County dredged a channel in the creek for mosquito control. The County approved development and the installation of culverts under the nearby state road to allow for the increased flow of water in the creek. Cumulatively, these culverts caused the creek to widen and, in a heavy rainstorm, the water would back up and not drain properly. The landowner brought suit claiming inverse condemnation, but lost at the trial level.<sup>394</sup> The First District Court of Appeal affirmed because the record did not contain evidence of a permanent deprivation of the beneficial use of the land, and suggested that the landowner should have brought an action for damages against any third party responsible for increasing the surface water flow across its land.<sup>395</sup>

*Jacobi v. City of Miami Beach.*<sup>396</sup> Landowners owned two lots, with the house on one lot overlapping onto the second lot. In order to obtain a building permit for the second lot, the owners sought to reconfigure the two lots to eliminate any overlap. The City's Department of Planning and Zoning approved the requested reconfiguration and then issued the building permit, which was reversed by the Board of Adjustment.<sup>397</sup> The property owners

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387. *Id.* at 888-89.

388. *Id.* at 890.

389. *Id.*

390. *Id.*

391. See FLA. STAT. §§ 73.091-.092 (1993).

392. *Gibbins*, 696 So. 2d at 890.

393. 677 So. 2d 90 (Fla. 1st Dist. Ct. App. 1996).

394. *Id.* at 91.

395. *Id.*

396. 678 So. 2d 1365 (Fla. 3d Dist Ct. App. 1996).

397. *Id.* at 1366.

finally got their approval after a successful appeal to the trial court's appellate division. They then sued for losses allegedly incurred as a result of the Board of Adjustment's erroneous reversal on the theories of inverse condemnation and violation of their due process rights.<sup>398</sup> The trial court granted the City's motion for summary judgment and the landowners appealed.<sup>399</sup>

The third district rejected the taking claim because the record reflected that, despite the denial of the permit application, the landowners still occupied and even improved the existing house.<sup>400</sup> Consequently, they were not deprived of "'substantially all economically beneficial or productive use of land.'"<sup>401</sup> The third district rejected the property owners' substantive due process claim.<sup>402</sup> The decision of the Board of Adjustment was executive, not legislative in nature.<sup>403</sup> Noting that "[t]he notion that the Constitution gives a property owner a substantive right to a correct decision from a government official . . . is novel indeed,"<sup>404</sup> the court pointed out that an executive act would violate substantive due process only if the right affected was "implicit in the concept of ordered liberty."<sup>405</sup> But none of the fundamental rights of these property owners had been infringed. Their interest in the reconfiguration approval and building permit issued by the Department of Planning and Zoning was not a fundamental right. Moreover, it was a right that was restored when relief was sought following the appeals process. In sum, the court declined to find that property owners who successfully appeal denials of building permits and the like are, without more, entitled to recover from the government for their resulting losses.<sup>406</sup>

*Nerbonne, N.V. v. Florida Power Corp.*<sup>407</sup> A landowner granted the County a right-of-way for public road purposes. Subsequently, the County granted the power company a permit to construct power lines along that right-of-way. The servient landowner claimed that the County had exceeded the

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398. *Id.* A violation of their civil rights would be actionable under 42 U.S.C. § 1983 (1994).

399. *Id.*

400. *Id.*

401. *Jacobi*, 678 So. 2d at 1366 (citation omitted).

402. *Id.*

403. *Id.* at 1367.

404. *Id.* at 1367-68 (quoting *Boatman v. Town of Oakland*, 76 F.3d 341, 346 (11th Cir. 1996)).

405. *Id.* at 1367 (quoting *C.B. By and Through Breeding v. Driscoll*, 82 F.3d 383, 387 (11th Cir. 1996)).

406. *Jacobi*, 678 So. 2d at 1367.

407. 692 So. 2d 928 (Fla. 5th Dist. Ct. App. 1997).

scope of the easement and demanded compensation. This action based upon inverse condemnation followed.<sup>408</sup>

The fifth district found that this was a case of first impression in Florida.<sup>409</sup> It reviewed decisions from other states and found decisions in Alaska<sup>410</sup> and Minnesota<sup>411</sup> particularly persuasive for the proposition that a right-of-way easement includes compatible uses by which energy or information might be transmitted.<sup>412</sup> The court stated that "[i]f the grantor had intended in 1952 to exclude public utilities from the easement, it would have been possible to do so. Since the document is silent, we construe the grant of right-of-way for public road purposes to include public utilities."<sup>413</sup>

*Palm Beach County v. Cove Club Investors Ltd.*<sup>414</sup> Palm Beach County acquired title to a residential mobile home lot by eminent domain. The mobile home lot was subject to a declaration of covenants that obligated the lot owners to pay a monthly recreation fee and required the Club to operate a golf course and country club for the use of the lot owners. The Club brought this suit claiming that it had suffered the loss of a property right in that the condemnation of the lot had deprived it of the income to which it was entitled. The trial court agreed, holding that a taking of property had occurred and reserved jurisdiction to determine the amount of compensation due.<sup>415</sup> The County appealed the taking determination, but the Fourth District Court of Appeal affirmed.<sup>416</sup>

The fourth district distinguished this case from *Board of Public Instruction of Dade County v. Town of Bay Harbor Islands*,<sup>417</sup> *North Dade Water Co. v. Florida State Turnpike Authority*,<sup>418</sup> and *Division of Administration, Department of Transportation v. Ely*.<sup>419</sup> The critical point seemed to be that the Club was still required to operate the golf course and country club facilities for the other owners, but without the support of the

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408. *Id.* at 928.

409. *Id.* at 929.

410. *Fisher v. Golden Valley Elec. Ass'n*, 658 P. 2d 127 (Alaska 1983).

411. *Cater v. Northwestern Tel. Exch. Co.*, 63 N.W. 111 (Minn. 1895).

412. *Nerbonne*, 692 So. 2d at 929 (citation omitted).

413. *Id.* at 930.

414. 692 So. 2d 998 (Fla. 4th Dist. Ct. App. 1997).

415. *Id.*

416. *Id.*

417. 81 So. 2d 637, 643 (Fla. 1955) (holding that mutual restrictions within a subdivision did not create property rights).

418. 114 So. 2d 458, 460 (Fla. 3d Dist. Ct. App. 1959), *dismissed*, 120 So. 2d 621 (Fla. 1960) (holding that an exclusive contract to sell water to subdivision was not a property right).

419. 351 So. 2d 66, 68 (Fla. 3d Dist. Ct. App. 1977) (concluding that a contract to sell gas to mobile home park residents was not a property right).

income stream from the condemned lot. The trial court concluded that this amounted to a taking and that “[t]he trial court’s determination on liability in an inverse condemnation suit is presumed correct and its findings will not be disturbed on appeal if supported by competent, substantial evidence.”<sup>420</sup> The fourth district also rejected the County’s claim that public policy would be violated by making the County pay for the Club’s lost income because the public policy is to compensate owners whose property is taken.<sup>421</sup> The fourth district subsequently granted the motion to certify the following question to the Supreme Court of Florida as being of great public importance:

WHETHER THE RIGHT OF A PRIVATE COUNTRY CLUB TO RECEIVE A STREAM OF INCOME FROM A MONTHLY RECREATION FEE ASSESSED AGAINST THE OWNER OF A RESIDENTIAL MOBILE HOME LOT CONSTITUTES A PROPERTY RIGHT COMPENSABLE UPON INVERSE CONDEMNATION BY THE COUNTY FOR USE OF THAT LOT IN A PUBLIC ROAD WIDENING PROJECT?<sup>422</sup>

#### XI. ENVIRONMENTAL LAW

*Ober v. Florida Department of Environmental Protection.*<sup>423</sup> The fifth district held that Ober was entitled to reimbursement for the clean-up of storage tanks and contaminated soil on Ober’s property.<sup>424</sup> Ober owned property that was leased and used as an AAMCO transmission shop. During inspection of the property, the Environmental Control Division determined the site, containing underground storage tanks and an oil/water separator, was contaminated. Ober employed an environmental contractor to remedy the situation, and once this was completed, the contractor filed a closure report. Ober later applied for entry into the Abandoned Tank Restoration Program pursuant to section 376.305(7) of the *Florida Statutes*, providing for “financial assistance to a clean site contaminated by petroleum or petroleum products.”<sup>425</sup> The Department of Environmental Regulation later told Ober

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420. *Cove Club*, 692 So. 2d at 999.

421. *Id.* at 1000.

422. *Id.*

423. 688 So. 2d 435 (Fla. 5th Dist. Ct. App. 1997).

424. *Id.* at 436.

425. *Id.* (citing FLA. STAT. § 376.305(7) (1995)).

that the contamination at his site was eligible for reimbursement under the statute.<sup>426</sup>

When Ober filed for reimbursement of the \$46,765.24, the Department of Environmental Protection ("DEP") denied the request, concluding that the costs accrued were due to surface spillage of contaminants not covered by the statute. Further, the DEP found that the source of contamination was "improper disposal and storage methods; and that the underground storage system was not the source of contamination of the facility."<sup>427</sup> Ober filed a petition for an administrative hearing. The hearing officer found the contamination to be the result of discharge of petroleum products specified under section 376.301 of the *Florida Statutes*.<sup>428</sup>

The issue before the court was whether the waste oil and transmission fluid (which the hearing officer found to be the source of the contamination) were "petroleum products" as defined by section 376.301 of the *Florida Statutes*.<sup>429</sup> The court rejected the Department's argument that distinguished between "waste oil" and "used oil" because it overlooked the fact that the intent of the statute was to reimburse property owners for remedying contaminated sites.<sup>430</sup> The court looked to rule 62-770.200(12) of the *Florida Administrative Code* where it defined used oil.<sup>431</sup> It recognized the rule had no definition of waste oil even though the hearing officer and Ober's witness at the hearing used the terms "used oil and waste oil interchangeably."<sup>432</sup> Since there was evidence that lubricants described as waste oil or transmission fluid, which contaminated the soil from underground tanks were used in Florida as fuel, "the conclusion of the hearing officer that these lubricants were liquid fuel commodities made from petroleum and thus 'petroleum products' . . . should have been sustained."<sup>433</sup> Thus, Ober should have been reimbursed.

*Florida Department of Environmental Protection v. Fleet Credit Corp.*<sup>434</sup> The fourth district reversed summary judgment granted in favor of Fleet Credit on the grounds that the statute of limitations had expired before Florida's Department of Environmental Protection filed the action.<sup>435</sup> The

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426. *Id.*

427. *Id.*

428. *Ober*, 688 So. 2d at 436-37.

429. *Id.* at 437.

430. *Id.* at 438.

431. *Id.*

432. *Id.*

433. *Ober*, 688 So. 2d at 438.

434. 691 So. 2d 512 (Fla. 4th Dist. Ct. App. 1997).

435. *Id.* at 514.

court reasoned that summary judgment was inappropriate because “the statute of limitations begins to run when the last element of a cause of action accrues.”<sup>436</sup> “Florida’s environmental resource and recovery management statutes are remedial in nature” and have the purpose to clean up unused waste disposal sites to protect the public health and safety.<sup>437</sup> It was irrelevant when Fleet abandoned the property because the ongoing contamination constituted continuing disruption.<sup>438</sup> In conclusion, when there is a continuing invasion of rights with regard to environmental concerns, the statute of limitations does not run until the wrongful invasion terminates.<sup>439</sup>

## XII. EQUITABLE REMEDIES

*Lee County v. Fort Myers Airways, Inc.*<sup>440</sup> Arbitrators decided that both the landlord, Lee County, and the tenant, Fort Myers Airways, had breached the lease and both were entitled to damages.<sup>441</sup> The trial court confirmed the decision and also ordered the landlord to maintain the buildings structurally as required by the lease.<sup>442</sup> The maintenance order was reversed by the Second District Court of Appeal, which reasoned that the order was a mandatory injunction.<sup>443</sup> According to the second district, “mandatory injunctions are looked upon with disfavor and should be granted sparingly and cautiously.”<sup>444</sup> Injunctions should be granted only upon a showing of “(1) a clear legal right, (2) the inadequacy of a remedy at law, and (3) that irreparable injury will occur if such relief is not granted.”<sup>445</sup> Unfortunately, the trial court had not made a finding that the prerequisites were satisfied.<sup>446</sup> Furthermore, an injunction should not be issued where it would produce hardship disproportionate to the one the injunction would prevent; however, the trial court made no finding concerning relative hardship to the parties.<sup>447</sup> These defects in the judgment mandated reversal.<sup>448</sup>

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436. *Id.*

437. *Id.* See FLA. STAT. § 403.702 (1995).

438. *Fleet*, 691 So. 2d at 514.

439. *Id.*

440. 688 So. 2d 389 (Fla. 2d Dist. Ct. App. 1997).

441. *Id.* at 390.

442. *Id.*

443. *Id.*

444. *Id.*

445. *Lee*, 688 So. 2d at 390.

446. *Id.*

447. *Id.*

448. *Id.*



Chief Judge Threadgill dissented regarding the injunction.<sup>449</sup> He recharacterized the order as granting specific performance and found ample authority in section 44.104(11) of the *Florida Statutes* for the trial court to grant specific performance based on the arbitrators' award without making further findings.<sup>450</sup> He also urged deference to the opinion of the trial judge, noting that the litigation had been in progress for eight years.<sup>451</sup>

*Licea v. Anllo*.<sup>452</sup> The buyer brought suit for specific performance of a real estate sales contract and filed a notice of lis pendens. In response, the seller filed a motion asking for either discharge of the lis pendens or that the buyer be required to post a bond. Over the buyer's objection that an evidentiary hearing was necessary, the trial court heard the matter on its motion calendar and set bond for \$350,000.<sup>453</sup> The Third District Court of Appeal reversed.<sup>454</sup>

A bond is needed for a notice of lis pendens only if the property owner is likely to suffer and demonstrates loss or damage if the notice later proves unjustified. If a bond is appropriate, its amount must bear a "reasonable relationship" to that potential loss or damage.<sup>455</sup> A court could only make the finding that harm or damage is likely and determine the reasonable amount of the bond after an evidentiary hearing.<sup>456</sup>

*Morton v. Cord Realty, Inc.*<sup>457</sup> As part of the settlement of complex litigation, a development company transferred the development property to its president and then ceased doing business. The broker, seeking to recover sales commissions from the development company, filed supplementary proceedings under section 56.29(6)(a) of the *Florida Statutes* to set aside the transfer.<sup>458</sup> The trial court voided the transfer and the case was appealed.<sup>459</sup> The Fourth District Court of Appeal ruled that the trial court erred in relying entirely upon section 56.29 because that only provided the procedural mechanism for setting aside a fraudulent transfer and not the substantive law.<sup>460</sup> That is now found in chapter 726 of the *Florida Statutes*, Fraudulent

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449. *Id.* at 391 (Threadgill, C.J., dissenting).

450. *Lee*, 688 So. 2d at 391.

451. *Id.*

452. 691 So. 2d 29 (Fla. 3d Dist. Ct. App. 1997).

453. *Id.* at 30.

454. *Id.*

455. *Id.* (citation omitted).

456. *Id.*

457. 677 So. 2d 1322 (Fla. 4th Dist. Ct. App. 1996).

458. *Id.* at 1323. *See* FLA. STAT. § 56.29(6)(a) (1993).

459. *Morton*, 677 So. 2d at 1324.

460. *Id.*

Transfers.<sup>461</sup> Consequently, the case had to be reversed and remanded for retrial.<sup>462</sup>

*Wal-Mart Stores, Inc. v. AAA Asphalt, Inc.*<sup>463</sup> Subcontractors sought equitable relief against the landowner under section 713.31 of the *Florida Statutes*, which provided for such relief “[w]hen the owner or any lienor shall, by fraud or collusion, deprive or attempt to deprive any [construction] lienor of benefits or rights to which such lienor is entitled. . . .”<sup>464</sup> The trial court granted summary judgment to the subcontractors and the landowner appealed.<sup>465</sup> The question was what the legislature meant by “fraud.”<sup>466</sup> The trial court concluded its meaning encompassed constructive fraud, committed by “negligently failing to determine the invalidity of the [contractor’s] payment bond,”<sup>467</sup> but the First District Court of Appeal disagreed.<sup>468</sup>

The district court noted that fraud, for the purposes of this section, had not been defined by statute or by any case.<sup>469</sup> However, in other construction cases involving the term “fraud,” courts had interpreted the term as involving intentional conduct.<sup>470</sup> Moreover, the term “fraudulent lien” within the same section had been interpreted to mean a lien for an amount that had been willfully exaggerated.<sup>471</sup> The court reasoned that fraud as used in this chapter should be interpreted consistently.<sup>472</sup> Consequently, equitable relief was available only if the landowner had the intent to defraud. Therefore, the trial court’s finding that the landowner was negligent did not satisfy that requirement.<sup>473</sup>

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461. See FLA. STAT. § 56.29(6)(a) (1993).

462. *Morton*, 677 So. 2d at 1324.

463. 677 So. 2d 93 (Fla. 1st Dist. Ct. App. 1996).

464. *Id.* at 94 (quoting FLA. STAT. § 713.31 (1993)).

465. *Id.*

466. *Id.*

467. *Id.*

468. *Wal-Mart*, 677 So. 2d at 94.

469. *Id.*

470. *Id.* See *First Interstate Dev. Corp. v. Ablanedo*, 511 So. 2d 536, 539 (Fla. 1987); *Taylor v. Kenco Chemical & Mfg. Corp.*, 465 So. 2d 581, 589 (Fla. 1st Dist. Ct. App. 1985).

471. *Wal-Mart*, 677 So. 2d at 94 (citing *Vinci Dev. Co. v. Connell*, 509 So. 2d 1128, 1132 (Fla. 2d Dist. Ct. App. 1987)).

472. *Id.*

473. *Id.*

## XIII. FRAUDULENT CONVEYANCES

*381651 Alberta, LTD. v. 279298 Alberta, LTD.*<sup>474</sup> The issue before this court was “whether 27 Alberta’s action to set aside the conveyances is one at law or equity given the fact that 27 Alberta seeks also that the proceeds from the sale of the property be applied to satisfy the money judgment?”<sup>475</sup> 27 Alberta, a Canadian corporation, received a \$2,375,811.17 judgment against Adams, an individual.<sup>476</sup> Adams’ personal property, including two condominiums was held by Eljada Holdings Family Trust Corporation.<sup>477</sup> “After the entry of the judgment, Eljada transferred the mortgages on the condominiums to Adams’ brother’s company, 381651 Alberta, Ltd., (“38 Alberta”), allegedly as security for a loan.”<sup>478</sup>

“Therefore, 27 Alberta filed suit against Adams, Eljada, and 38 Alberta seeking an order setting aside the transfers as fraudulent conveyances and mandating the sale of the real property to satisfy the judgment.”<sup>479</sup> The trial court denied 38 Alberta’s request for a jury trial and later found that Adams “evaded personal liability by titling . . . personal assets” in Eljada’s name.<sup>480</sup> The trial court determined that the mortgages were fraudulent conveyances and set them aside.<sup>481</sup> The Fourth District Court of Appeal affirmed the final judgment, but wrote an opinion to address the jury trial issue.<sup>482</sup>

The right to a jury trial applies only to legal causes of action,<sup>483</sup> and actions seeking monetary judgments are traditionally ones at law.<sup>484</sup> The fourth district distinguished other federal decisions to review this case. However, it noted that in *Mission Bay Campland, Inc. v. Sumner*,<sup>485</sup> the district court held “[b]ecause the equitable remedy of annulment for a fraudulent transfer of assets was sought, there was no federal constitutional

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474. 675 So. 2d 1385 (Fla. 4th Dist. Ct. App. 1996).

475. *Id.* at 1387.

476. *Id.* at 1386.

477. *Id.*

478. *Id.*

479. *38 Alberta*, 675 So. 2d at 1386.

480. *Id.*

481. *Id.*

482. *Id.* at 1387.

483. *Id.* (citing *King Mountain Condominium Ass'n v. Gundlach*, 425 So. 2d 569 (Fla. 4th Dist. Ct. App. 1982)).

484. *38 Alberta*, 675 So. 2d at 1387 (relying on *Hutchens v. Maxicenters, U.S.A.*, 541 So. 2d 618, 623 (Fla. 5th Dist. Ct. App. 1988)).

485. 72 F.R.D. 464 (M.D. Fla. 1976).

right to a jury trial.”<sup>486</sup> This case parallels the situation in *Alberta*. 27 *Alberta* had an equitable claim against Adams’ assets.<sup>487</sup> “[A]n action to set aside the fraudulent conveyance of Adams’ real property is equitable in nature since it does not result in a general adjudication of title to the property.”<sup>488</sup> Section 56.29 of the *Florida Statutes* states one cannot give, transfer, convey, or assign anything to hinder or defraud creditors.<sup>489</sup> The fourth district found that *Alberta* should be handled like the *Mission Bay* and *Allied* cases.<sup>490</sup> Therefore, because 27 *Alberta*’s pursuance of Adams’ property is equitable in nature, there is no right to a jury trial.<sup>491</sup>

#### XIV. HOMEOWNERS’ ASSOCIATIONS

*Sanzare v. Varesi*.<sup>492</sup> The Fourth District Court of Appeal reversed final summary judgment in favor of Varesi and the Coconut Key Homeowners Association (“Association”). The fourth district remanded the case to resolve genuine issues of material fact concerning the Association’s knowledge of the presence and vicious propensities of a tenant’s dog.<sup>493</sup>

While Sanzare walked his dog on a nondedicated street running through a “common area” owned by the Association, he was bitten by a dog owned by two people leasing a residence within the community. Sanzare filed a negligence action against the Association. In turn, the Association moved for summary judgment arguing it owed no duty to Sanzare. The Association claimed that “liability for the dog-bite incident could be extended only to the owner of the dog or the landlord of the property where the dog was kept.”<sup>494</sup>

The trial court granted summary judgment in favor of the Association.<sup>495</sup> The district court reversed the trial court’s holding, noting that genuine issues of material fact remain to be addressed.<sup>496</sup> A landowner may be liable for injuries resulting from an attack of a tenant’s dog, if the landowner knows of the animal’s vicious propensity and has the ability to

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486. 38 *Alberta*, 675 So. 2d at 1387 (quoting *Mission Bay Campland, Inc. v. Sumner Fin. Corp.*, 72 F.R.D. 464 (M.D. Fla. 1976) (citation omitted)).

487. *Id.* at 1388.

488. *Id.*

489. FLA. STAT. § 56.29(6)(b) (1993).

490. 38 *Alberta*, 675 So. 2d at 1388.

491. *Id.*

492. 681 So. 2d 785 (Fla. 4th Dist. Ct. App. 1996).

493. *Id.* at 786.

494. *Id.*

495. *Id.*

496. *Id.*

control the animal's presence.<sup>497</sup> The district court recognized factual issues remain as to whether the Association had knowledge of the animal's presence and vicious propensities, as well as the Association's ability to control the dog's presence.<sup>498</sup>

*Westwood Community Two Ass'n v. Lewis*.<sup>499</sup> In this case the homeowners filed suit to enforce sections 760.20-.37 of the *Florida Statutes*, the familial status provisions of the Florida Fair Housing Act.<sup>500</sup> The homeowners association appealed adverse summary judgment in favor of the appellees, homeowners in Westwood community.<sup>501</sup> The Fourth District Court of Appeal affirmed the trial court's holding, reasoning that the association was without the authority to exempt itself from the above statutory provisions.<sup>502</sup> The association was enjoined from representing the community as "housing for older persons" where one must be fifty-five years of age or older to reside.<sup>503</sup>

In 1989, the sixteen-year-old age requirement set forth in the Westwood declaration of restrictions was nullified by an amendment to the Fair Housing Act.<sup>504</sup> This amendment was intended to prevent the Westwood community from discriminating based on familial status. As a result, the Westwood homeowners association amended its bylaws to fit within the "housing for older persons" exemption to familial status.<sup>505</sup> Paragraph fifteen of the Westwood declaration of restrictions stated that "covenants, restrictions, reservations[,] and servitudes" run with the land and bind those claiming ownership or use of land until March 1, 2022.<sup>506</sup> The association's bylaws provided for amendments, but the bylaws stated that "[n]o amendment shall be made which is in conflict with the Declaration of Restrictions."<sup>507</sup> However, "Westwood's declaration of restrictions did not reserve to the association the right to amend the covenants or provide for amendment of the covenants by a vote of lot owners."<sup>508</sup> When it amended its bylaws, the

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497. *Sanzare*, 681 So. 2d at 786 (citing *Vasques v. Lopez*, 509 So. 2d 1241 (Fla. 4th Dist. Ct. App. 1987)).

498. *Id.*

499. 687 So. 2d 296 (Fla. 4th Dist. Ct. App. 1997).

500. *Id.* at 297.

501. *Id.*

502. *Id.*

503. *Id.*

504. *Lewis*, 687 So. 2d at 297.

505. *Id.*

506. *Id.*

507. *Id.*

508. *Id.*

association exercised authority it did not have.<sup>509</sup> The association could not amend its declaration of restrictions just because the Fair Housing Act voided the sixteen-year-old age restriction.<sup>510</sup>

## XV. HOMESTEAD

*Crain v. Putnam*.<sup>511</sup> The Fourth District Court of Appeal concluded that the elderly owner of a home was still entitled to homestead exemption even though she was placed in a nursing home.<sup>512</sup> Crain was placed in a nursing home after suffering extensive brain damage in 1992. In 1994, her son, the appellant, applied for tax exemption for the property pursuant to section 196.101 of the *Florida Statutes*, entitled “[e]xemption for totally and permanently disabled persons.”<sup>513</sup> Even though Crain satisfied the statutory provisions and qualified for the exemption, both the property appraiser and the trial court denied tax exemption because Crain failed to reside on the property.<sup>514</sup> The question before the fourth district was “whether the property was being ‘used’ within the meaning of section 196.101(1) or (2).”<sup>515</sup>

The court found no cases on point with regard to Article VII of the Florida Constitution, which addresses homestead exemption from forced sale and limits on devise. However, the court considered several cases that addressed the homestead exemption in Article X, section 4, which exempts homesteads from forced sale and limits their devise. No cases were found on point with regard to Article VII of the Florida Constitution. Although the two homestead provisions found in the Florida Constitution are separate and distinct, the court articulated no reason why Mrs. Crain could not keep her homestead exemption under Article VII when she would retain it under Article X.<sup>516</sup> The court reversed and remanded for entry in favor of the appellant, concluding that physical presence was not a requirement to receive homestead exemption.<sup>517</sup>

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509. *Lewis*, 687 So. 2d at 297.

510. *Id.* at 298.

511. 687 So. 2d 1325 (Fla. 4th Dist. Ct. App. 1997).

512. *Id.* at 1325.

513. *Id.* See FLA. STAT. § 196.101 (1993).

514. *Crain*, 687 So. 2d at 1326.

515. *Id.* at 1325-26.

516. *Id.* at 1326.

517. *Id.*

*Snyder v. Davis*.<sup>518</sup> This case came before the Supreme Court of Florida under the following certified question:

WHETHER ARTICLE X, SECTION 4, OF THE FLORIDA CONSTITUTION EXEMPTS FROM FORCED SALE A DEVISE OF A HOMESTEAD BY A DECEDENT NOT SURVIVED BY A SPOUSE OR MINOR CHILD TO A LINEAL DESCENDANT WHO IS NOT AN HEIR UNDER THE DEFINITION IN SECTION 731.201(18), FLORIDA STATUTES (1993).<sup>519</sup>

The Supreme Court answered the certified question in the affirmative and quashed the district court's decision.<sup>520</sup> Betty Snyder died testate in 1995 and was survived by her only son Milo Snyder and his daughter, the appellee, Kelli Snyder. Betty Snyder, in her last will and testament, devised her residual estate, including her homestead to Kelli Snyder.<sup>521</sup>

Kelli Snyder petitioned the probate court seeking a determination that Betty Snyder's homestead passed to her free and clear of claims of creditors because Kelli was recognized as an "heir" under the intestate statute. Alternatively, Kent W. Davis, the personal representative of the decedent's estate, and the appellant in this cause of action, sought to sell the homestead property to satisfy creditor's claims and other expenses. Mr. Davis argued that under section 732.103 of the *Florida Statutes*, Milo Snyder was the sole heir to the decedent's estate. Therefore, because the estate was devised to the granddaughter and not to the heir, Mr. Davis contended that the property was not exempt from forced sale to satisfy such claims and expenses. The trial court granted Kelli Snyder's petition.<sup>522</sup> The Second District Court of Appeal reversed the trial court's order and remanded for further proceedings.<sup>523</sup>

Article X, section 4(a) of the Florida Constitution states that a homestead is "exempt from forced sale . . . except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor

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518. 699 So. 2d 999 (Fla. 1997). Although the Supreme Court of Florida did not render this decision until after June 30, 1997, (the last date that this survey period covers), the authors included it to avoid confusing the reader.

519. *Id.* at 1000.

520. *Id.*

521. *Id.*

522. *Id.*

523. *Davis v. Snyder*, 681 So. 2d 1191, 1193 (Fla. 2d Dist. Ct. App. 1996).

performed on the realty.”<sup>524</sup> At issue was whether Kelli Snyder “is an heir as contemplated by [A]rticle X, section 4, of the Florida Constitution and as defined in sections 731.201(18) and 732.103.”<sup>525</sup>

Under 731.201(18), “heirs” are defined as “those persons, including surviving spouse, who are entitled under the statutes of intestate succession to the property of a decedent.”<sup>526</sup> In contrast to the Second District Court of Appeal’s reasoning in the common law understanding of what might constitute an “heir,” the Supreme Court of Florida concurred with the First District Court of Appeal in *Walker v. Mickler*<sup>527</sup> and applied a broader definition to the term “heirs” to include “any of the class of potential heirs under the intestacy statute.”<sup>528</sup> The Supreme Court of Florida emphasized that: 1) the homestead provision’s purpose is to protect and maintain the family homestead; and 2) the testator is the one who would be in the best position to know which family member would most likely need the homestead or would most likely be in a position to maintain its position.<sup>529</sup>

*Farrior v. Estate of Farrior*.<sup>530</sup> The issue before the court was whether the devised homestead was exempt from the apportionment of estate taxes under section 733.817(d) of the *Florida Statutes*.<sup>531</sup> This court looked to the Second District Court of Appeal decision in *Davis v. Snyder*,<sup>532</sup> which held that where a decedent was not survived by a spouse or minor children and the homestead was properly devised, the devisee takes the decedent’s former homestead subject to claims of the decedent’s creditors.<sup>533</sup> Here, the decedent was survived by three grandchildren and two adult children.<sup>534</sup> Accordingly, this court affirmed the trial court’s order holding Jay Farrior, appellant and grandson of decedent, “liable for apportionment of estate taxes on property devised to him by his grandfather and which property was [his] decedent grandfather’s primary residence and homestead.”<sup>535</sup> However, that decision has since been quashed by the Supreme Court of Florida.<sup>536</sup>

524. *Id.* (citing FLA. CONST. art. X, § 4(a)).

525. *Id.* at 1192.

526. FLA. STAT. § 731.201(18) (1993).

527. 687 So. 2d 1328 (Fla. 1st Dist. Ct. App. 1997).

528. *Snyder*, 699 So. 2d at 1004.

529. *Id.* at 1005.

530. 694 So. 2d 804 (Fla. 2d Dist. Ct. App. 1997).

531. *Id.* at 804. See FLA. STAT. § 733.817(d) (1995).

532. *Davis*, 681 So. 2d at 1191.

533. *Id.*

534. *Farrior*, 694 So. 2d at 804.

535. *Id.*

536. See *Snyder*, 699 So. 2d at 1000.



*State Agency for Health Care Administration v. Conner*.<sup>537</sup> The Second District Court of Appeal reversed the trial court's determination that Madalyn Skiles' interest in a house devised to her by the decedent was entitled to the Florida Constitution homestead exemption from forced sale.<sup>538</sup> Madalyn Hinterleiter, decedent, devised a life estate in her home to Myron Conner, a friend. The remainder of the estate and the home were left to Skiles. The issue here centered on Hinterleiter's being survived by her granddaughter, Skiles, and by also by a daughter.<sup>539</sup>

Article X, section 4 of the Florida Constitution provides a homestead exemption from forced sale which "inure[s] to the surviving spouse or heirs of the owner."<sup>540</sup> The trial court ruled that Skiles was entitled to homestead exemption, but there was no authority on point at the time.<sup>541</sup> Subsequently, the Second District Court of Appeal decided *Davis v. Snyder*.<sup>542</sup> The *Davis* court said devised property was not entitled to homestead exemption from forced sale based upon the definition of heirs located in the Probate Code.<sup>543</sup> The *Davis* case prompted the court to certify the following question of great public importance:

WHETHER ARTICLE X, SECTION 4, OF THE FLORIDA CONSTITUTION EXEMPTS FROM FORCED SALE A DEVISE OF A HOMESTEAD BY A DECEDENT NOT SURVIVED BY A SPOUSE OR MINOR CHILD TO A LINEAL DESCENDENT WHO IS NOT AN HEIR UNDER THE DEFINITION IN SECTION 731.201(18), FLORIDA STATUTES (1993)?<sup>544</sup>

This court recognized that the *Davis* case governed the case at bar and reversed the trial court's order.<sup>545</sup> In addition, the court also certified the question above as one of great public importance.<sup>546</sup> As noted above, however, the Supreme Court of Florida has since quashed the Second District Court of Appeal's decision in *Davis*.<sup>547</sup>

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537. 692 So. 2d 234 (Fla. 2d Dist. Ct. App. 1997).

538. *Id.* at 235.

539. *Id.*

540. *Id.* See FLA. CONST. art. X, § 4.

541. *Conner*, 692 So. 2d at 235.

542. *Davis*, 681 So. 2d at 1191.

543. *Id.* at 1193. See FLA. STAT. §§ 731.201(18), 731.103 (1993).

544. *Davis*, 681 So. 2d at 1193.

545. *Conner*, 692 So. 2d at 236.

546. *Id.*

547. *Davis*, 681 So. 2d at 1191.

*Knadle v. Estate of Knadle*.<sup>548</sup> The First District Court of Appeal certified the following question as one of public importance:

DOES SECTION 4(b), ARTICLE X OF THE FLORIDA CONSTITUTION PROTECT THE PROCEEDS OF THE SALE OF HOMESTEAD PROPERTY WHERE DECEDENT'S WILL DIRECTS THE PERSONAL REPRESENTATIVE TO SELL THE PROPERTY AND PLACE THE PROCEEDS INTO THE RESIDUE OF THE ESTATE FOR DISTRIBUTION TO DECEDENT'S ADULT CHILDREN?<sup>549</sup>

On November 14, 1994, the decedent, Evangeline Stewart Knadle, died testate and was survived by two adult children. Her "estate included personal assets and real property declared as her homestead."<sup>550</sup> The decedent's will contained a provision addressing the homestead property and what should be done with it. Most importantly, the provision expressed the decedent's wish that her personal representative sell the homestead and add the net proceeds to the rest of the estate. Arbor Health Care filed a claim against the decedent's estate seeking payment of past bills. Michael Knadle, the son and personal representative of decedent, filed a petition to determine homestead real estate asserting it was entitled to exemption.<sup>551</sup>

The lower court held that homestead property was an asset of the estate, vulnerable to creditors, because decedent devised the property by will making it a gift to her children.<sup>552</sup> Michael Knadle appealed to the First District Court of Appeal.<sup>553</sup> The decedent's will specifically directed that her homestead be sold and the proceeds placed in the residue for distribution with the other assets.<sup>554</sup> Because the decedent devised her homestead as she did under these circumstances, the court reasoned that the property lost its homestead status and creditors, such as Arbor Health Care, could assert their claims.<sup>555</sup>

*Rutherford v. Gascon*.<sup>556</sup> The question before the Second District Court of Appeal was whether Mrs. Smith waived her homestead rights by entering into a settlement agreement with Don Gascon wherein she agreed to hold only

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548. 686 So. 2d 631 (Fla. 1st Dist. Ct. App. 1996).

549. *Id.* at 633.

550. *Id.* at 632.

551. *Id.*

552. *Id.*

553. *Knadle*, 686 So. 2d at 632.

554. *Id.*

555. *Id.*

556. 679 So. 2d 329 (Fla. 2d Dist. Ct. App. 1996).

a life estate in the disputed property.<sup>557</sup> Mr. and Mrs. Robert Smith resided at a condominium, owned by Mr. Smith, which was located in St. Petersburg, Florida. After they were married, Mr. Smith executed a will which gave his wife, Mrs. Smith, the right to live in the condominium as long as she wished. However, in the event she died or chose not to reside there, Mr. Smith gave and devised the condominium to his nephew, Don Gascon.<sup>558</sup>

After a dispute arose between Mrs. Smith and Gascon concerning Mrs. Smith's rights to probate assets under her deceased husband's will, a settlement agreement followed where Mrs. Smith signed a document waiving her elective share in the probate estate and accepting a life estate in the property.<sup>559</sup> After Mrs. Smith died, her estate representative filed a petition to have the condominium declared homestead property. The trial court denied this petition, reasoning that Mrs. Smith waived homestead rights when she entered the settlement agreement with Gascon and accepted a life estate.<sup>560</sup>

The second district reversed on the grounds that the settlement agreement neither displayed an intent by Mrs. Smith to waive homestead rights nor showed that Mrs. Smith had knowledge that she relinquished a homestead interest.<sup>561</sup> Evidence offered revealed that Mrs. Smith was in fact unaware that a fee simple interest in the homestead vested in her immediately upon her husband's death.<sup>562</sup> Therefore, in order to find that Mrs. Smith had waived homestead protection, there must have been evidence showing she intended to do so.<sup>563</sup>

*Tramel v. Stewart.*<sup>564</sup> Chief Justice Kogan and Justices Overton, Shaw, Grimes, and Harding concurred in this per curiam opinion.<sup>565</sup> Justice Anstead dissented with an opinion,<sup>566</sup> and Justice Wells concurred with an opinion.<sup>567</sup> The court reviewed the following certified question:

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WHETHER ARTICLE X, SECTION 4, FLA. CONST.,  
PROHIBITS CIVIL FORFEITURE OF HOMESTEAD

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557. *Id.* at 330.

558. *Id.*

559. *Id.*

560. *Id.*

561. *Rutherford*, 679 So. 2d at 330-31.

562. *Id.* at 331 (citing FLA. CONST. art. X, § 4(c); FLA. STAT. § 732.4015 (1993); *In re Estate of Finch*, 401 So. 2d 1308 (Fla. 1981) ("[H]omestead may not be devised by will to pass less than a fee simple interest where testator dies leaving a surviving spouse." ).

563. *Id.*

564. 697 So. 2d 821 (Fla. 1997).

565. *Id.* at 825.

566. *Id.* (Anstead, J., dissenting).

567. *Id.* (Wells, J., concurring).

PROPERTY PURSUANT TO SECTIONS 932.701-.702, FLA.  
STAT., WHEN THE PROCEEDS OF ILLEGAL ACTIVITY ARE  
INVESTED IN OR USED TO PURCHASE THE PROPERTY?<sup>568</sup>

Forfeiture procedures were initiated against Stewart for selling and growing marijuana on the premises of their home. Stewart claimed the real property was homestead property that was not forfeitable. Nevertheless, the trial court entered judgment forfeiting all personal and real property.<sup>569</sup> The First District Court of Appeal reversed the ruling as to the homestead forfeiture and certified the above question to the Supreme Court of Florida.<sup>570</sup>

The Supreme Court of Florida looked to Article X, section 4 of the Florida Constitution which construed homestead as exempt from forced sale.<sup>571</sup> The supreme court has previously held that Article X, section 4 prohibited civil or criminal forfeiture of homestead used in the course of racketeering activity in violation of Florida's Racketeer Influenced and Corrupt Act.<sup>572</sup> The court agreed with the district court's holding that the state did not have a right to the forfeiture of a homestead on the basis of an equitable lien.<sup>573</sup> Based on the constitution, the court could not find that a forfeiture of homestead could be predicated on the Forfeiture Act.<sup>574</sup>

Before the Forfeiture Act could provide a basis for the forfeiture of homestead property, the constitution's homestead exemption must be liberally construed to permit a forfeiture for a violation of the Forfeiture Act.<sup>575</sup> The court recognized that Article X, section 4 did not provide an exception for the forfeiture of homestead property for a violation of the Forfeiture Act.<sup>576</sup> Although acquiring homestead through felonious activity is wrong, permitting forfeiture on this basis would require a constitutional revision.<sup>577</sup> Therefore, the Supreme Court of Florida answered the certified question in the affirmative and agreed with the district court's reversal with respect to the forfeiture of homestead property.<sup>578</sup>

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568. *Id.*

569. *Tramel*, 697 So. 2d at 821.

570. *Id.*

571. *Id.* See FLA. CONST. art. X, § 4.

572. *Tramel*, 697 So. 2d at 823. See *Butterworth v. Caggiano*, 605 So. 2d 56 (Fla. 1992).

573. *Tramel*, 697 So. 2d at 824.

574. *Id.*

575. *Id.*

576. *Id.*

577. *Id.*

578. *Tramel*, 697 So. 2d at 824.

*Walker v. Mickler*.<sup>579</sup> The First District Court of Appeal affirmed the decision that the decedent's grandson, Bayle, was entitled to protection under Article X, section 4(b) of the Florida Constitution from the estate's creditors when a remainder interest was devised to him.<sup>580</sup> Article X, section 4(b) provides that exemptions and protections established for homestead "shall inure to the surviving spouse or heirs of the owner."<sup>581</sup> Heirs are "those who may under the law of the state inherit from the owner of the homestead."<sup>582</sup> Bayle, as grandson, was a lineal descendant of the decedent and qualified as a person entitled to receive under intestacy and for Article X purposes.<sup>583</sup>

The First District Court of Appeal found the reasoning in *Bartelt v. Bartelt* persuasive.<sup>584</sup> The *Bartelt* court found it insignificant that the son and daughter would have taken equally under intestacy, but that the daughter was omitted from the will.<sup>585</sup> The *Bartelt* court, as the court here, concluded the sequence and share of inheritance as established under the intestacy statutes did not necessarily determine entitlement to homestead exemption.<sup>586</sup>

Although the decision here was contrary to the Second District Court of Appeal's decision in *Davis*, this court recognized that the opinion was contrary to the goal of homestead exemption against forced sale.<sup>587</sup> This direction was supported by the Supreme Court of Florida in *Snyder*.<sup>588</sup> The constitution is silent as to the drafters' intent with regard to creditors' rights to homestead, but Article V, section 4(b) as amended in 1984, reflected the intent that homestead exemption inure to whomever gets the property.<sup>589</sup> This court reasoned it is clear that the intent of homestead exemption is to protect the decedent's homestead from his creditors for the benefit of his heirs.<sup>590</sup> It should make no difference if the person chosen to receive property under the

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579. 687 So. 2d 1328 (Fla. 1st Dist. Ct. App. 1997), *aff'd*, 699 So. 2d 687 (Fla. 1997). In *Snyder v. Davis*, the Supreme Court of Florida recognized that the decision in *Walker* was in conflict with that given by the Second District Court of Appeal in *Davis v. Snyder*. *Snyder*, 699 So. 2d at 1000.

580. *Walker*, 687 So. 2d at 1328.

581. *Id.* at 1329 (quoting FLA. CONST. art. X, § 4)).

582. *Id.* (citing *State Dep't of Health and Rehabilitative Servs. v. Trammell*, 508 So. 2d 422 (Fla. 1st Dist. Ct. App. 1987)).

583. *Id.* See FLA. STAT. §§ 732.103(1), 732.401(1) (1993).

584. *Walker*, 687 So. 2d at 1329. See *Bartelt v. Bartelt*, 579 So. 2d 282 (Fla. 3d Dist. Ct. App. 1991).

585. *Walker*, 687 So. 2d at 1329.

586. *Id.*

587. *Id.* at 1330.

588. *Snyder v. Davis*, 699 So. 2d 999, 1000 (Fla. 1997).

589. *Walker*, 687 So. 2d at 1330.

590. *Id.*

will would not be the closest consanguine heir.<sup>591</sup> The person is still one entitled to take by intestate succession.<sup>592</sup> In addition, the constitution could not intend that creditors gain a windfall by allowing them to take homestead by forced sale because the beneficiary under the decedent's will was not the closest consanguine heir. To deny Bayle the property would go against constitutional intent.<sup>593</sup> Therefore, this court affirmed the lower court's decision and recognized conflict with the *Davis* court.<sup>594</sup>

## XVI. INSURANCE

*Florida Farm Bureau Casualty Insurance Co. v. Sheaffer*.<sup>595</sup> The Sheaffers sought recovery under their homeowners insurance policy for damages caused by hurricanes Erin and Opal. This court reversed the trial court decision and agreed with the insurance company that the appraisal provision in the policy required arbitration, which was a condition precedent to the Sheaffers maintaining an action on the policy.<sup>596</sup>

The Sheaffers' damaged roof was made of unique ceramic tiles that could no longer be matched. The insurance policy covered losses "at replacement cost without deduction for depreciation."<sup>597</sup> The Sheaffers wanted the insurance company to pay for replacement of the entire roof to return it to its condition and value before the hurricane. The insurance company refused, and stated that the roof could be repaired by replacing the damaged or missing tiles with other tiles not consistent with the ones already there.<sup>598</sup> The trial court denied the insurance company's motion to dismiss concluding that the dispute between the parties involved an issue of coverage under the policy.<sup>599</sup>

This court concluded that the issue was not coverage but rather the amount of the loss.<sup>600</sup> The court relied on *J.J.F. of Palm Beach, Inc. v. State Farm Fire and Casualty Co.*,<sup>601</sup> which stated that "[w]here the amount owed on a claim, arguably within the policy coverage, is dependent on the

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591. *Id.*

592. *Id.*

593. *Id.* at 1331.

594. *Walker*, 687 So. 2d at 1331.

595. 687 So. 2d 1331 (Fla. 1st Dist. Ct. App. 1997).

596. *Id.* at 1332.

597. *Id.*

598. *Id.*

599. *Id.*

600. *Sheaffer*, 687 So.2d at 1332.

601. 634 So. 2d 1089, 1090 (Fla. 4th Dist. Ct. App. 1994).

resolution of disputed issues of fact and the application of policy language to those facts . . . the extent of the claim does not constitute a "coverage" question."<sup>602</sup> Once it is determined that the claim is covered by the policy, "whether the claimant is actually entitled under the facts of the case to be paid on a claim and, if so, the precise amount to which the claimant is entitled, is a question reserved for the arbitrator."<sup>603</sup> Since the insurance company agreed that damage to Sheaffers' home was a covered claim, the only question was the scope of the required repair and the amount of loss.<sup>604</sup>

*New England Mutual Life Insurance Co. v. Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A.*<sup>605</sup> This case was originally a suit against the insurer, Affiliated FM Insurance Co., for property damage coverage due to Hurricane Andrew. P.P. Partners, Ltd. and Parkhill Partners, Ltd., the owners of two shopping centers insured by Affiliated, brought suit against the Insurer for payment of damages. The owners later retained the Podhurst law firm which requested it be paid on a contingent fee basis. New England Mutual held mortgages on the two shopping centers and was given the right to direct how the insurance proceeds were to be used. When the law firm obtained the insurance money, the checks were made jointly to the owners and to New England, the lender. Therefore, both the lender and the owners had to agree to disburse the funds.<sup>606</sup>

The lender refused to disperse money to satisfy the law firm's contingent share.<sup>607</sup> The lender stated that its interest in the insurance proceeds had priority over the attorney's fee claims. The law firm filed a motion to impose an attorney's charging lien on the proceeds and to get a disbursement order to release the funds from the escrow account. The trial court ruled in favor of the firm and entered orders for disbursement.<sup>608</sup>

The question the Third District Court of Appeal determined was what rule of priority governs competing claims to first in time insurance proceeds.<sup>609</sup> The lender's lien arose from the mortgage. The firm's claim arose later in time.<sup>610</sup> The general rule of priority is first in time, first in

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602. *Sheaffer*, 687 So. 2d at 1334 (quoting *J.J.F. of Palm Beach, Inc. v. State Farm Fire & Cas. Co.*, 634 So. 2d 1089, 1090 (Fla. 4th Dist. Ct. App. 1994)).

603. *Id.* (quoting *J.J.F. of Palm Beach, Inc. v. State Farm Fire & Cas. Co.*, 634 So. 2d 1089, 1090 (Fla. 4th Dist. Ct. App. 1994)).

604. *Id.*

605. 690 So. 2d 1354 (Fla. 3d Dist. Ct. App. 1997).

606. *Id.* at 1354-55.

607. *Id.* at 1355.

608. *Id.*

609. *Id.* at 1356.

610. *New England Mut. Life Ins. Co.*, 690 So. 2d at 1356.

right.<sup>611</sup> Here, the lender was a loss payee on the insurance policy. So, the firm was chargeable with notice of the lender's earlier in time claim to the proceeds.<sup>612</sup> The owner's agreement to pay the contingent fee was not binding on the lender.<sup>613</sup> If the law firm wanted to receive priority over the lender, the firm would have to secure the lender's consent.<sup>614</sup>

The owners, pursuant to the mortgages, must maintain the property and have the burden to make post hurricane repairs, including steps to pursue insurance proceeds.<sup>615</sup> To shift priorities, the court reasoned, would allow owners' contingent fee agreement to by-pass the lenders first in time lien without securing the lender's consent.<sup>616</sup> In addition, under section 627.428 of the *Florida Statutes*, "an insured who successfully obtain[ed] judgment against its insurer in an insurance lawsuit is entitled to recover attorney's fees from the insurer."<sup>617</sup> Therefore, the court reversed.<sup>618</sup>

*Secured Realty Investment Fund, LTD, III v. Highlands Insurance Co.*<sup>619</sup>

The question before the court was "whether the mortgagee may recover insurance proceeds under a policy containing a New York Standard Mortgage clause after the mortgage debt has been fully satisfied by foreclosure or otherwise."<sup>620</sup>

On October 17, 1991, the Garcias entered into a mortgage and security agreement with Century Investment Company.<sup>621</sup> The mortgage encumbered two properties, one in Key Largo, the other in Dade County.<sup>622</sup> Century assigned the interest on the note and mortgage to Secured Realty, who later became the sole mortgagee.<sup>623</sup> The Garcias had an insurance policy issued by Highlands to cover the Key Largo investment.<sup>624</sup> When the Garcias defaulted on payment, Secured Realty initiated foreclosure proceedings. At the foreclosure sale, Secured Realty took title to both the Key Largo and Dade

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611. *Id.*

612. *Id.* at 1357.

613. *Id.*

614. *Id.*

615. *New England Mut. Life Ins. Co.*, 690 So. 2d at 1357.

616. *Id.*

617. *Id.* See FLA. STAT. § 627.428 (1995).

618. *New England Mut. Life Ins. Co.*, 690 So. 2d at 1358.

619. 678 So. 2d 852 (Fla. 3d Dist. Ct. App. 1996).

620. *Id.* at 855 (quoting *Nationwide Mut. Fire Ins. Co. v. Wilborn*, 279 So. 2d 460, 462 (Ala. 1973)).

621. *Id.* at 853.

622. *Id.*

623. *Id.*

624. *Secured Realty Inv. Fund*, 678 So. 2d at 853.



properties.<sup>625</sup> When the Key Largo property was later discovered to be damaged, Secured Realty notified Highlands of the damage in order to make a claim under the policy initially secured by the Garcias.<sup>626</sup> In early July, 1993, Secured Realty sold both properties. Later in the month, Highlands offered \$45,000 for the damage to Key Largo and Secured rejected the offer and filed a complaint.<sup>627</sup>

The trial court agreed with Highland that Secured did not have an insurable interest in the Key Largo property at the time the damage occurred.<sup>628</sup> When Secured took title of the properties, the fair market value exceeded the redemption amount.<sup>629</sup> Since the debt was satisfied, Secured Realty could no longer be considered the mortgagee.<sup>630</sup>

The Third District Court of Appeal was forced to construe the mortgage loss payable clause contained within the insurance policy issued by Highlands to the Garcias.<sup>631</sup> The court found the clause to be a New York Standard Mortgage clause.<sup>632</sup> This type of clause provides that the loss is payable and the owner/mortgagor's acts or neglect would not invalidate the insurance as long as the lienholder/mortgagee shall pay the premium if the owner/mortgagor fails to do so.<sup>633</sup>

The general rule established by *Wilborn* recognized that the "loss payee clause affords protection to the mortgagee as his interest may appear before or after foreclosure or other methods of change of ownership or title or other mediums of increased ownership of the mortgage property and the insurance follows the property."<sup>634</sup> The exception to this rule states that "if the mortgage indebtedness is fully satisfied after loss by foreclosure or otherwise, then the insurance company is no longer liable to the mortgagee."<sup>635</sup> The third district held that Secured Realty retained an insurable interest in the Key Largo property after it acquired title to it by foreclosure.<sup>636</sup> The third district

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625. *Id.*

626. *Id.*

627. *Id.*

628. *Id.*

629. *Secured Realty Inv. Fund*, 678 So. 2d at 853.

630. *Id.* at 853-54.

631. *Id.* at 854.

632. *Id.* at 855.

633. *Id.* at 854.

634. *Secured Realty Inv. Fund*, 678 So. 2d at 855-56 (quoting *Nationwide Mut. Fire Ins. Co. v. Wilborn*, 279 So. 2d 460, 465 (Ala. 1973)).

635. *Id.* at 856 (quoting *Nationwide Mut. Fire Ins. Co. v. Wilborn*, 279 So. 2d 460, 465 (Ala. 1973)).

636. *Id.*

reversed the lower court holding because Secured Realty had an insurable interest at the time of the loss.<sup>637</sup>

*State Farm Fire and Casualty Co. v. Licea*.<sup>638</sup> Justice Harding wrote the court's opinion with which Justices Overton, Shaw, Grimes, Wells, and Anstead concurred.<sup>639</sup> The Supreme Court of Florida held that an insurance appraisal clause was not void for lack of mutuality because of a retained rights clause.<sup>640</sup>

Licea's home was damaged by Hurricane Andrew. When a dispute arose as to the amount of damage, the insurance policy stated that State Farm and Licea were each to select an appraiser and the appraisers chosen would then pick an impartial umpire. If the appointed appraisers could not make the selection, the court would be advised to pick one. This is exactly what happened here. Because the chosen appraisers could not reach an agreement, State Farm petitioned the court to appoint an umpire.<sup>641</sup>

In addition, a clause in the policy stated that an appraisal of damage did not waive any rights of the parties involved.<sup>642</sup> The Liceas argued that because of this clause, State Farm reserved its rights. So, the parties were not equally bound by the appraisal.<sup>643</sup> As such, the Liceas contended the appraisal clause should be declared void for lack of mutuality.<sup>644</sup> The trial court denied State Farm's request for an umpire and the Third District Court of Appeal affirmed.<sup>645</sup>

The Supreme Court of Florida rejected the Third District Court of Appeal's decision and relied on the rationale set forth in the dissent in *American Reliance Insurance Co. v. Village Homes at Country Walk*.<sup>646</sup> The *Country Walk* dissent set forth the rule that "by participating in an arbitration proceeding to determine the amount of loss suffered by an insured the insurer

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637. *Id.*

638. 685 So. 2d 1285 (Fla. 1996).

639. *See generally id.*

640. *Id.* at 1286.

641. *Id.*

642. *Id.*

643. *Licea*, 685 So. 2d at 1286.

644. *Id.*

645. *Id.*

646. *Id.* at 1288 (relying on *American Reliance Ins. Co. v. Village Homes at Country Walk*, 632 So. 2d 106 (Fla. 3d Dist. Ct. App. 1994) (Cope, J., dissenting), *overruled by* *Paradise Plaza Condominium Ass'n v. Reinsurance Corp.*, 685 So. 2d 937 (Fla. 3d Dist. Ct. App. 1996)).

is in no way deprived of the right to later contest the existence of insurance coverage for that loss.<sup>647</sup>

If a court decides coverage exists, the dollar value agreed upon under the appraisal process will be binding on the parties.<sup>648</sup> When appraisal is necessary, the insurer can only try to assert there is no coverage under the policy for the loss, or there has been a violation of the usual policy conditions such as fraud, lack of notice, or failure to cooperate.<sup>649</sup> The appraisal clause in this case required an assessment of the amount of loss. As such, the clause would not be void for lack of mutuality.<sup>650</sup>

## XVII. LANDLORD AND TENANT

*Badaraco v. Suncoast Towers V Associates.*<sup>651</sup> The tenant brought an action for damages against the landlord who was in the process of renovating a rental building so it could be converted into a condominium. The tenant based his cause of action on section 83.67 of the *Florida Statutes*, which prohibited landlords from terminating or interrupting utility services and provided that a violator would be liable for the greater of three months rent or actual and consequential damages.<sup>652</sup> The circuit court dismissed the complaint and the third district affirmed.<sup>653</sup>

Judge Gersten started by noting that the critical factor in statutory interpretation is determining the legislative intent.<sup>654</sup> He then invoked the golden rule exception to the plain meaning approach to statutory interpretation, i.e., the statute should not be given a literal reading because that would produce an absurd or unreasonable conclusion.<sup>655</sup> He reasoned that the legislature could not have intended a minimum three month rent penalty for a landlord who was performing necessary maintenance.<sup>656</sup> His review of the legislative history, including the legislative staff analysis and staff summaries, revealed that the legislature's purpose in enacting the statute

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647. *Id.* at 1286 (quoting *State Farm Casualty Co. v. Licea*, 649 So. 2d 910, 911 (Fla. 3d Dist. Ct. App. 1995)); see *Country Walk*, 632 So. 2d at 108-09 (Cope, J., dissenting).

648. *Licea*, 685 So. 2d at 1287-88.

649. *Id.* at 1288.

650. *Id.*

651. 676 So. 2d 502 (Fla. 3d Dist. Ct. App. 1996).

652. *Id.* at 503. See FLA. STAT. § 83.67 (1995).

653. *Badaraco*, 676 So. 2d at 503.

654. *Id.* (relying on *State v. Webb*, 398 So. 2d 820 (Fla. 1981)).

655. *Id.* See *Weber v. Dobbins*, 616 So. 2d 956 (Fla. 1993); *State v. Webb*, 398 So. 2d 820 (Fla. 1981).

656. *Badaraco*, 676 So. 2d at 503.

was to prevent landlords from using utility shutoffs to coerce tenants to vacate.<sup>657</sup> Here, the tenant admitted that the landlord had no such motive.<sup>658</sup>

This outcome troubles this author.<sup>659</sup> The opinion is logical, but the facts suggest that the landlord might have been violating the rights of his tenants to have utility service for the sole purpose of making these units more saleable. Landlords ignoring the rights of tenants for their own gain is the sort of evil that the legislature sought to prohibit, even if it is not the particular landlord misconduct that the legislature had in mind at the moment of enactment. It is suggested that the purpose to the statutory interpretation approach would lead to a better conclusion. The modern residential tenant has a critical need for and right to utility service. Reasonable interruptions for the performance of maintenance are inevitable, and it is unlikely that the legislature intended to penalize such interruptions, but the interruption here does not seem to have occurred as part of maintenance. The brief statement of facts suggests that the interruptions were caused by the landlord changing the property so he could sell it after the lease ended. A tenant would not ordinarily be expected to tolerate the landlord renovating his unit for a prospective sale. Why should the current tenant bear the burden of loss of utility services during the term of the lease because the landlord has plans for the property after the lease expires? Certainly the legislature could not have intended to allow this. To the degree that this landlord was interrupting the tenants' utility service, not for maintenance but to prepare it for sale, the landlord should be held liable. The complaint should not have been dismissed.

*Brandt v. Dade Dental Center, Inc.*<sup>660</sup> The commercial lease provided that the tenant would be responsible for paying fifteen percent of any increase over the base year in the real estate taxes and insurance premiums. When the tenant discovered that it occupied only 2.4 percent of the building, the tenant refused to pay. The trial court refused to enforce this clause, holding it to be unconscionable and "monstrously harsh."<sup>661</sup> The fact that the landlord would have been able to make a profit from a tax or premium increase by similarly overcharging all the tenants was used by the circuit court to confirm its conclusion.<sup>662</sup> The Third District Court of Appeal affirmed based on its finding that there was sufficient evidence in the record to support judgment, noting that the clause required the tenant to pay over six times its pro rata

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657. *Id.* at 503 n.1.

658. *Id.* at 503.

659. Professor Ronald Benton Brown.

660. 680 So. 2d 1063 (Fla. 3d Dist. Ct. App. 1996).

661. *Id.* at 1064.

662. *Id.*

share.<sup>663</sup> The third district seemed to place particular importance on the fact that the tenant had thought that it was being charged its share of the increases and was surprised to discover that the clause required it to pay such a disproportionate amount.<sup>664</sup>

This author<sup>665</sup> finds this an odd case to invoke the doctrine of unconscionability. The tenant was a dental office, so the case did not deal with an uneducated or unable tenant. Nor was it a tenant who did not have access to adequate legal representation. The crux of the decision seems to be that the clause implicitly misrepresented the facts to the tenant, i.e., that the share of the increase it would have to bear was proportional to the share of the land that it had leased. The landlord misrepresented the crucial fact, so the court penalized him by denying him the increase.<sup>666</sup> It seems that the better solution would be reformation, i.e., reform the clause to reflect the proper percentage. The trial court may not have felt it had that option because it was not the relief requested, and the district court, faced with the same poor choices, chose to affirm as the lesser of two evils. This illustrates the old adage, "hard cases make bad law."

*Land O'Sun Realty Ltd. v. REWJB Gas Investments.*<sup>667</sup> The parties were involved in twenty-two commercial leases utilizing a common lease document. This case involved the interpretation of two clauses in that lease. Paragraph three provided that the total of the initial term plus all renewal terms would be twenty-seven years. Paragraph four, however, provided: "[n]otwithstanding any conflicting or inconsistent provisions . . . including specifically paragraph 3 hereof, the term of each of the Leases and all renewal terms shall automatically terminate at the date that is eighteen months after the date of this Amendment."<sup>668</sup> The issue was which controlled, the twenty-seven year or the eighteen month maximum.<sup>669</sup> The jury decided in favor of the longer period and the landlord appealed.<sup>670</sup>

The district court found that the terms were in irreconcilable conflict, making it impossible to answer the question without resort to parol evidence.<sup>671</sup> It pointed out that reading paragraph four to control paragraph three would render three meaningless, violating the rule of construction that

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663. *Id.*

664. *Id.*

665. Professor Ronald Benton Brown.

666. *See generally Brandt*, 680 So. 2d 1064.

667. 685 So. 2d 870 (Fla. 3d Dist. Ct. App. 1996).

668. *Id.* at 871.

669. *Id.*

670. *Id.*

671. *Id.* at 871-72.

an interpretation should not render any part of the contract superfluous.<sup>672</sup> The court should have also pointed out that the converse was also true, i.e., reading paragraph three to control paragraph four would render four meaningless. That was the irreconcilable conflict. Having established that the trial court properly admitted parol evidence, the only remaining task for the appellate court was to determine that the decision was supported by sufficient evidence, even though the testimony of the parties was “as hopelessly in conflict as the written agreement.”<sup>673</sup>

Judge Jorgenson dissented, emphasizing the word “notwithstanding” in paragraph four of the amendment of the lease.<sup>674</sup> He reasoned that paragraph four expressly provided how to deal with the apparent conflict between the paragraphs eliminating any conflict in their application.<sup>675</sup> Consequently, he would have held that the admission of parol evidence was unjustified.<sup>676</sup>

*Mayor's Jewelers, Inc. v. State of California Public Employees' Retirement System.*<sup>677</sup> The commercial lease for space in this mall provided that the tenant would keep the business open on all business days of the calendar year. The tenant, however, gave notice that it intended to break the lease and vacate. The landlord sued to temporarily enjoin the tenant from breaking the lease and to force the tenant to perform as required by the open-for-business covenant. The circuit court granted a temporary injunction, but the fourth district reversed.<sup>678</sup>

The district court decided that the case was not governed by *Lincoln Tower Corp. v. Richter's Jewelry Co.*<sup>679</sup> because it did not involve a tenant who wanted to vacate.<sup>680</sup> Consequently, the case was one of first impression in Florida.<sup>681</sup> The court noted that injunctions should not be granted when that would involve the court in the business of supervising future performance.<sup>682</sup> In this case, the temporary injunction (and subsequent

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672. *Land O'Sun Realty*, 685 So. 2d at 871.

673. *Id.* at 872 n.3.

674. *Id.* at 873 (Jorgenson, J., dissenting).

675. *Id.*

676. *Id.*

677. 685 So. 2d 904 (Fla. 4th Dist. Ct. App. 1996).

678. *Id.* at 904.

679. 12 So. 2d 452 (Fla. 1943) (holding that a tenant could be enjoined from breaching the lease by failing to remain open year-round).

680. *Mayor's Jewelers, Inc.*, 685 So. 2d at 905.

681. *Id.*

682. *Id.*

specific performance order) would, in effect, force the court to supervise the operation of the mall, so the relief should be denied.<sup>683</sup>

Also, injunctions and specific performance, as forms of equitable relief, should not be granted where there is an adequate remedy at law. In this case, the landlord's harm would be purely economic, making an action for damages for breach of the lease an adequate remedy. However, the court declined to reach any conclusion on this issue because it had already decided the case on the first issue.<sup>684</sup>

Judge Farmer provided a wonderfully written special concurrence.<sup>685</sup> In essence, he found that the lease had a liquidated damages clause that provided the landlord with an adequate remedy at law, thereby depriving the landlord of an essential ingredient of a claim for equitable relief.<sup>686</sup> He explained that the cumulative remedies clause allowed the landlord to seek both eviction and damages rather than allowing it equitable relief to which it would not otherwise be entitled.<sup>687</sup> Furthermore, he pointed out that mandatory injunctions, i.e., injunctions requiring the party to act in a certain way, are generally disfavored, particularly where the contract involves personal services and stated, "[i]n my opinion, requiring a tenant by specific performance to occupy leased premises for the full term . . . is much akin to requiring an employee to serve out his contractual term of employment."<sup>688</sup>

Finally, Judge Farmer questioned the intervention of equity on behalf of a party who was ignoring economic reality.<sup>689</sup> This was an older mall which had passed its prime. Most of the tenants, including the anchors, had moved out. To require an upscale jeweler to remain open in that setting made no sense.<sup>690</sup> "[W]hat purpose," Judge Farmer asked rhetorically, "is served by the intervention of equity, other than to support the unproductive economic decisions of the landlord?"<sup>691</sup>

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683. *Id.*

684. *Id.* at 908 (Farmer, J., concurring).

685. *Mayor's Jewelers, Inc.*, 685 So. 2d at 906 (Farmer, J., concurring).

686. *Id.* at 907.

687. *Id.*

688. *Id.* at 910.

689. *Id.* at 911.

690. *Mayor's Jewelers, Inc.*, 685 So. 2d at 910-11.

691. *Id.* at 911.

## XVIII. LIENS

*Grant v. Wester*.<sup>692</sup> The issue before the court was whether Mr. Grant was entitled to attorneys' fees under his claim that he had a right to foreclose a mechanic's lien.<sup>693</sup> Grant contracted with the Westers to build a home on Westers' land. When most of the work was completed on May 11, 1992, Westers gave Grant a list of items still needed to be finished or corrected in the home.<sup>694</sup> On May 15, 1992, the Westers moved into the home and a certificate of occupancy was issued. In addition, all items on the Westers' list had been remedied.<sup>695</sup>

Afterwards, Wester told Grant he would not make full payment until Grant added a hot water recovery unit to the air conditioning system and until he covered the foundation of the house with stucco.<sup>696</sup> Grant complied and charged accordingly for the new requests. When Grant asked to be compensated for his work, Mrs. Wester added two more items to the list of corrections. Grant obliged and once again requested payment. The Westers refused. Grant then delivered an affidavit to the Westers stating that all lienors under the contract had been paid in full. Grant recorded a notice of claim of lien stating the unpaid balance.<sup>697</sup>

Grant filed a complaint seeking enforcement of a mechanic's lien under section 713.01 of the *Florida Statutes* and also seeking attorneys' fees under section 713.29 of the *Florida Statutes*.<sup>698</sup> In addition, Grant stated a claim for breach of contract.<sup>699</sup> Although Grant prevailed on the breach of contract claim, the court determined that Grant should not get attorneys' fees because he did not prove count one of the complaint to enforce the lien.<sup>700</sup>

As Grant appealed count one, he filed notice of lis pendens to protect the asserted lien and to collect money from the judgment as to the other count for breach of contract.<sup>701</sup> The sheriff levied Westers' goods pursuant to court order to collect Grant's judgment money. Wester filed an emergency motion to set aside the lis pendens and writ of execution.<sup>702</sup> At the emergency

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692. 679 So. 2d 1301 (Fla. 1st Dist. Ct. App. 1996).

693. *Id.* at 1306.

694. *Id.* at 1303.

695. *Id.*

696. *Id.*

697. *Grant*, 679 So. 2d at 1303.

698. *Id.* (relying on FLA. STAT. § 713.01, -.29 (1991)).

699. *Id.*

700. *Id.* at 1304.

701. *Id.*

702. *Grant*, 679 So. 2d at 1304.



hearing, the trial court ordered the Westers to pay the balance of the judgment.<sup>703</sup> After payment was made pursuant to court order, the trial court also ordered that no interest would accrue after the money was deposited.<sup>704</sup>

The First District Court of Appeal noted that Grant received some money under the judgment.<sup>705</sup> The general rule is that “one cannot ordinarily accept a benefit under a judgment or decree and then appeal from it, when the effect of his appeal may be to annul the decree as a whole.”<sup>706</sup> “[C]ase law reveals that there are two exceptions to this stated rule: 1) where the relief denied is separate and severable from the relief granted; or 2) where the appellant is entitled in any event to at least the amount received.”<sup>707</sup> There is also a general rule that “where a judgment is appealed on the ground that the damages awarded [were] inadequate, acceptance of payment of the amount of the unsatisfactory judgment does not, standing alone, amount to an accord and satisfaction of the entire claim.”<sup>708</sup>

The question presented here as to attorneys’ fees falls within one of the stated exceptions. Just because Grant collected judgment money, he is not precluded from bringing an appeal to recover attorneys’ fees.<sup>709</sup> “Where a contractor complies with all provisions of Chapter 713, Florida Statutes, and has substantially performed the contract, he is entitled to a mechanic’s lien.”<sup>710</sup> Since the trial court awarded money reflecting a finding that Grant completed 97.7 percent of his obligation, that percentage constituted substantial performance.<sup>711</sup> As such, the Fourth District Court of Appeal stated it was error not to allow foreclosure of Grant’s mechanic’s lien.<sup>712</sup>

When a mechanic’s lien is foreclosed, the prevailing party recovers attorneys’ fees. However, “to be a prevailing party entitled to the award of attorney’s fees pursuant to section 713.29, a litigant must have recovered an amount exceeding that which was earlier offered in settlement of the

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703. *Id.*

704. *Id.*

705. *Id.* at 1305.

706. *Id.* (quoting *Capital Fin. Corp. v. Oliver*, 156 So. 736, 737 (Fla. 1934)).

707. *Grant*, 679 So. 2d at 1305 (quoting *McMullen v. Fort Pierce Fin. & Constr. Co.*, 146 So. 567 (Fla. 1933)).

708. *Id.* at 1306 (quoting *United States v. Hougham*, 364 U.S. 310, 312 (1960)).

709. *Id.*

710. *Id.* at 1307 (quoting *Viking Communities Corp. v. Peeler Constr. Co.*, 367 So. 2d 737, 739 (Fla. 4th Dist. Ct. App. 1989) (citations omitted)).

711. *Id.* at 1308.

712. *Grant*, 679 So. 2d at 1308.

claim.”<sup>713</sup> Wester argued that Grant tried to settle by offering payment. The offer must have been timely and adequate in amount to preclude an award for attorneys’ fees.<sup>714</sup> The court recognized that the issues of adequacy and timeliness were never addressed because the lower court denied foreclosure on the lien.<sup>715</sup> As such, the court reversed the judgment because it denied foreclosure of the lien and remanded for the award of attorneys’ fees, if the lower court decided Wester did not make a timely, adequate offer to settle.<sup>716</sup>

*Herpel, Inc. v. Straub Capital Corp.*<sup>717</sup> The Fourth District Court of Appeal reversed the lower court decision and held that the lien was timely recorded as required by section 713.08(5) of the *Florida Statutes*.<sup>718</sup> Herpel, by contract, was required to make a mantel for a new residence owned by Blossom Estate.<sup>719</sup> The contract was only for materials. After the mantel was delivered and installed, George Straub, the owner’s authorized agent, was not satisfied with its appearance. Herpel’s workers removed the mantel for refinishing and later reinstalled it.<sup>720</sup>

Herpel filed a claim of lien 113 days after the original delivery but within ninety days of the date of redelivery.<sup>721</sup> Section 713.08(5) of the *Florida Statutes* states that “[t]he claim of lien may be recorded at any time during the progress of the work or thereafter but not later than 90 days after the final furnishing of the labor or services or materials by the lienor.”<sup>722</sup> The trial court determined that the claim of lien was not timely filed.<sup>723</sup>

This court reversed the trial court decision.<sup>724</sup> The fourth district recognized that the cases the trial court relied on were not sufficient because they did not address the “final furnishing” of purchased materials.<sup>725</sup> The trial court stated:

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[T]he majority rule is that, after the installation of fixtures or equipment in a building, later services in the nature of correction or

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713. *Id.* (quoting *C.U. Assoc. v. R.B. Grove*, 472 So. 2d 1177, 1179 (Fla. 1985)).

714. *Id.*

715. *Id.*

716. *Id.*

717. 682 So. 2d 661 (Fla. 4th Dist. Ct. App. 1996).

718. *Id.* at 661.

719. *Id.* at 661-62.

720. *Id.* at 662.

721. *Id.*

722. *Herpel*, 682 So. 2d at 662 (quoting FLA. STAT. § 713.08(5) (1993)).

723. *Id.*

724. *Id.* at 663.

725. *Id.* at 662.

repair are not regarded as a part of the installation so as to make the time within which to file under a mechanic's lien based on the original installation run from the time of performance of such later services. This rule is followed in Florida. . . . Therefore, this warranty work was not the final furnishing of labor or materials.<sup>726</sup>

In addition, the court applied the test used in *Century Trust Co. of Baltimore v. Allison Realty Co.*<sup>727</sup> "The test to be applied is whether the work was done in good faith, within a reasonable time, in pursuance of the terms of the contract, and whether it was necessary to a 'finished job.'"<sup>728</sup> "[W]ork done in fulfillment of the contract is contemplated by the contract and extends the time for filing, since the contract is not complete until the work is done."<sup>729</sup> Corrective or repair work does not extend the time for filing the claim of lien because the contract is already complete.<sup>730</sup> Here, the contract was for materials only so the rationale cited from the cases above should be applied.<sup>731</sup>

The fourth district held that the final furnishing of the materials occurred when the mantel was reinstalled.<sup>732</sup> The additional work after the initial installation was only to complete the job as set out in the contract.<sup>733</sup> As such, the lien was properly recorded within the ninety days required by the statute.<sup>734</sup>

*Personal Representative of Estate of Jacobson v. Attorneys' Title Insurance Fund, Inc.*<sup>735</sup> The Third District Court of Appeal reversed the lower court's decision, since the lien was not valid due to the Monroe County Code Enforcement Board's failure to comply with statutory formalities.<sup>736</sup> The property in question was sold three times after the lien was recorded.<sup>737</sup> The last owner, Maggie Kaspersetz, discovered the lien after she purchased the property and received a warranty deed from Attorneys' Title Insurance

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726. *Id.* (citing *Viking Builders, Inc. v. Felices*, 391 So. 2d 302, 303 (Fla. 5th Dist. Ct. App. 1980)).

727. *Herpel*, 682 So. 2d at 663 (relying on *Century Trust Co. of Baltimore v. Allison Realty Co.*, 141 So. 612 (Fla. 1932)).

728. *Id.*

729. *Id.*

730. *Id.*

731. *Id.*

732. *Herpel*, 682 So. 2d at 663.

733. *Id.*

734. *Id.*

735. 685 So. 2d 19 (Fla. 3d Dist. Ct. App. 1996).

736. *Id.* at 20.

737. *Id.*

Fund. Attorneys' Title Insurance paid the lien and then sued Jacobson, as subrogee.<sup>738</sup> The trial court found for Attorneys' Title Insurance who also gained attorneys' fees at a later hearing.<sup>739</sup>

The third district reversed, reasoning that a lien is not acquired unless notice requirements are strictly complied with.<sup>740</sup> Section 162.12(1) of the *Florida Statutes* "requires that the alleged violator be sent notice by certified mail, by hand delivery, or by leaving the notice at the violator's place of residence."<sup>741</sup> In this case, notice was only sent by regular mail.<sup>742</sup>

"In addition, section 162.09(3), Florida Statutes (1989) states that, if the lien is to be recorded in the public records, a certified copy of the order imposing the fine must be recorded."<sup>743</sup> Since the county failed to give notice of record pursuant to statutory authority, the requirements for obtaining the lien were not met.<sup>744</sup> As such, the court declared the lien invalid.<sup>745</sup>

*Kerrigan v. Mosher*.<sup>746</sup> The Kerrigans appealed an order denying their motion to set aside the judicial sale of their homestead in connection with foreclosure of a mechanic's lien held by Mosher.<sup>747</sup> Mosher, being the sole bidder at a foreclosure sale, purchased the Kerrigans home for \$100. The home had a fair market value between \$300,000 and \$360,000 and was burdened by an \$87,000 mortgage. The Kerrigans believed their attorney would represent their interests at the sale. Unfortunately, the appointed attorney did not attend the sale, nor did he try to redeem the property for the Kerrigans.<sup>748</sup>

The First District Court of Appeal reversed the lower court's holding.<sup>749</sup> The foreclosure sale should have been set aside because of irregularity in the sale process.<sup>750</sup> Price is not enough to set aside the sale; however, the bid was grossly inadequate as a result of the attorney's misrepresentation.<sup>751</sup> As such, the sale should have been set aside and a new sale ordered.

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738. *Id.*

739. *Id.*

740. *Jacobson*, 685 So. 2d at 20.

741. *Id.* (citing FLA. STAT. § 162.12(1) (1989)).

742. *Id.*

743. *Id.*

744. *Id.*

745. *Jacobson*, 685 So. 2d at 20.

746. 679 So. 2d 874 (Fla. 1st Dist. Ct. App. 1996).

747. *Id.* at 874-75.

748. *Id.* at 875.

749. *Id.*

750. *Id.*

751. *Kerrigan*, 679 So. 2d at 875.

## XIX. MECHANICS' LIENS

*Craftsman Contractors, Inc. v. Brown.*<sup>752</sup> The First District Court of Appeal affirmed the trial court's order finding that Craftsman's lien was unenforceable because it failed to properly list all lienors who had not been paid in full on its final contractor's affidavit.<sup>753</sup> Craftsman's final affidavit stated that "all lienors, subcontractors, and materialmen" were paid in full.<sup>754</sup> However, even though subcontractor McElhany Electric was unpaid and not in the affidavit, Craftsman argued that section 713.06(3)(d)(1) of the *Florida Statutes* only required the final affidavit to list lienors.<sup>755</sup> In addition, it argued that McElhany Electric could not be a lienor since it failed to file notice to the owner as required by section 713.06(2)(a).<sup>756</sup>

The court recognized that one may be a lienor under chapter 713 of the *Florida Statutes* without giving notice.<sup>757</sup> Chapter 713 should not be narrowly construed. The court held that McElhany's failure to file notice to the owner did not remove it from the definition of "lienor" under chapter 713.06(3)(d)(1).<sup>758</sup>

*Current Control, Inc. v. Bankers Insurance Co.*<sup>759</sup> The Fifth District Court of Appeal affirmed the issuance of the writ of prohibition granted by the lower court.<sup>760</sup> Current Control filed a complaint to enforce a claim of lien which was transferred to a bond provided by Bankers Insurance Company.<sup>761</sup> Bankers' motion to dismiss, on the basis that the county court lacked subject matter jurisdiction, was denied. Bankers then sought and obtained a writ of prohibition from the circuit court on the same ground.<sup>762</sup>

The action before the Fifth District Court of Appeal was one brought on a bond issued pursuant to section 713.24 of the *Florida Statutes*. The essence of subsection three states that "[a]ny party having an interest in such security or the property from which the lien was transferred may at any time, and any number of times, file a complaint in chancery in the circuit court of the county

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752. 695 So. 2d 750 (Fla. 1st Dist. Ct. App. 1997).

753. *Id.* at 751.

754. *Id.*

755. *Id.* See FLA. STAT. § 713.06(3)(d)(1) (1993).

756. *Craftsman Contractors*, 695 So. 2d at 751. See also FLA. STAT. § 713.06(2)(a) (1993).

757. *Craftsman Contractors*, 695 So. 2d at 751.

758. *Id.*

759. 679 So. 2d 78 (Fla. 5th Dist. Ct. App. 1996).

760. *Id.* at 79.

761. *Id.* at 78.

762. *Id.*

where such security is deposited.”<sup>763</sup> The fifth district distinguished this case as being distinct from *Alexdex Corp. v. Nachon Enterprises, Inc.*, which the appellant raised.<sup>764</sup> In *Alexdex*, the Supreme Court of Florida noted that since a lien foreclosure action is one in equity, the circuit and county courts have concurrent jurisdiction for such matters, within set monetary limits.<sup>765</sup> In *Current Control, Inc.*, the action involved a mechanic’s lien claim transferred to a surety bond. This action is statutory in nature. The specific statute delineates that actions should be filed in circuit court regardless of the amount involved. As such, the writ of prohibition should be affirmed.<sup>766</sup>

## XX. MOBILE HOME PARKS

*Meadow Groves Management, Inc. v. McKnight.*<sup>767</sup> The lessee of a space in a mobile home park failed to pay the rent. The park sued, obtained a judgment for possession of the space, got a writ of possession, and had the sheriff remove the tenant and his goods. However, the tenant’s mobile home was left in the space. The park then advertised the mobile home for sale, relying on the statutory summary procedure provided in section 718.78 of the *Florida Statutes*.<sup>768</sup> The former lessee brought this action to enjoin the sale. The trial court granted the injunction because it concluded that the mobile home was exempt property because it was a homestead under section 222.05 of the *Florida Statutes*.<sup>769</sup> The Fifth District, sitting en banc, affirmed but for a different reason.<sup>770</sup>

The majority opinion, written by Chief Judge Peterson, held that the mobile home park had no right to use that statutory summary procedure.<sup>771</sup> The scope of section 713.78, which is entitled “Liens for recovering, towing or storing vehicles,” is provided by subsection two.<sup>772</sup> It provides a lien for “a person regularly engaged in the business of transporting

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763. *Id.*

764. *Current Control*, 679 So. 2d at 78. See *Alexdex Corp. v. Nachon Enter., Inc.*, 641 So. 2d 858 (Fla. 1994).

765. *Alexdex Corp.*, 641 So. 2d at 862.

766. *Current Control*, 679 So. 2d at 79.

767. 689 So. 2d 315 (Fla. 5th Dist. Ct. App. 1997).

768. *Id.* at 316. See FLA. STAT. § 718.78 (1993).

769. *Meadow Groves*, 689 So. 2d at 316 (relying on FLA. STAT. § 222.05 (1993)).

770. *Id.*

771. *Id.*

772. FLA. STAT. § 713.78 (1993).

vehicles by wrecker, tow truck, or car carrier.”<sup>773</sup> The mobile home park did not fit that definition.

The court then pointed out that the homestead exemption from forced sale was only available to a lessee of a mobile home lot if the mobile home was on land that “he may lawfully possess, by lease or otherwise.”<sup>774</sup> Since this tenant had been evicted, he could not lawfully possess the land under his mobile home. Thus, he lost his homestead exemption. The tenant claimed, however, that the park prevented him from removing his mobile home while he still had the right to lawfully possess the land. The district court found nothing in the record to support that claim, but ruled that, on remand, the trial court could consider evidence that the park had interfered with his right to remove his mobile home.<sup>775</sup>

Both Judge Sharp and Judge Thompson expressed dissent from the homestead part of the opinion.<sup>776</sup> The mobile home was homestead before the park obtained its judgment for back rent.<sup>777</sup> Both argued that homestead rights to a mobile home should not be cut off by the eviction.<sup>778</sup> That would conflict with and undermine the purpose of homestead, i.e., protecting the homesteader’s home, regardless of its form. Even though the park did not get the homesteader’s home this time, it would only be a matter of time before clever claimants used this ruling to circumvent mobile home owners’ homestead rights.

## XXI. MORTGAGES

*BancFlorida v. Hayward*.<sup>779</sup> Justice Grimes wrote the court’s opinion with which Justices Overton, Shaw, Harding, Wells, and Anstead concurred. Before the court was a certified question of great public importance:

WHERE A LENDER REQUIRES A PRE-QUALIFIED  
CONTRACT PURCHASER BEFORE IT WILL LEND ON THE  
CONSTRUCTION LOAN WHICH CREATES A PURCHASE  
MONEY MORTGAGE, DOES THE CONTRACT  
PURCHASER’S PRIOR EQUITABLE LIEN AGAINST THE

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773. *Meadow Groves*, 689 So. 2d at 316 (citing FLA. STAT. § 713.78(2) (1993)).

774. *Id.* at 317 (citing FLA. STAT. § 222.05 (1993)).

775. *Id.*

776. *Id.* (Thompson, Sharp, JJ., dissenting).

777. *Id.* at 319 (Sharp, J., dissenting).

778. *Meadow Groves*, 689 So. 2d at 319 (Thompson, Sharp, JJ., dissenting).

779. 689 So. 2d 1052 (Fla. 1997).

PURCHASE MONEY MORTGAGOR HAVE PRIORITY OVER  
THE LENDER'S SUBSEQUENT PURCHASE MONEY  
MORTGAGE?<sup>780</sup>

Shores Contractors developed lots and constructed single family homes in subdivisions owned by American Newlands. Shores had an option to acquire individual lots from American. Shores arranged for BancFlorida to provide funds to acquire lots and construct homes on those lots. When the developments failed and the homes were incomplete, Shores filed suit against the bank claiming a breach on the construction loan agreements caused the failure. The bank sought foreclosure of mortgages on the lots. The contract purchasers claimed equitable liens on the lots, and the bank claimed superiority of its mortgages. Final summary judgment of foreclosure was entered, and the bank foreclosed on the lots then purchased them at judicial sale.<sup>781</sup> The bank later sold them to a third party.<sup>782</sup>

"The trial court entered summary judgment in favor of the contract purchasers, holding that they held equitable liens on the lots which were entitled to priority over the bank's mortgages."<sup>783</sup> Although the Third District Court of Appeal held the bank mortgages were purchase money mortgages, it affirmed the judgment in favor of the contract purchasers.<sup>784</sup> The Supreme Court of Florida agreed that the bank's mortgages were purchase money mortgages.<sup>785</sup>

It is well settled that where the proceeds of a third party mortgage loan are used to purchase property, the mortgage of that property is a purchase money mortgage.<sup>786</sup> Most importantly, purchase money mortgages take priority over other claims or liens that attach to property through the mortgagor.<sup>787</sup> As such, "the court below erred in holding that the claims of contract purchasers were superior to the bank's purchase money mortgages."<sup>788</sup>

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780. *Id.* at 1052.

781. *Id.* at 1052-53.

782. *Id.* at 1053.

783. *Id.*

784. *BancFlorida*, 689 So. 2d at 1053.

785. *Id.*

786. *Id.* at 1053 (citing *Cheves v. First Nat'l Bank*, 83 So. 2d 870 (Fla. 1920); *Sarmiento v. Stockton, Whatley, Davin & Co.*, 399 So. 2d 1057 (Fla. 3d Dist. Ct. App. 1981)).

787. *Id.* at 1054.

788. *Id.*



The court pointed out that it could not “answer the certified question as worded because it presupposes that the contract purchasers had a prior equitable lien on the lots.”<sup>789</sup> Since the developer only held an option to purchase at the time the agreements were executed, this option created neither an equitable interest nor an equitable remedy under Florida law.<sup>790</sup> The developer had no property interest to which an equitable lien could attach.<sup>791</sup> The court held that “the bank’s mortgages on the twenty-two lots have priority over the claims of the contract purchasers but only to the extent that the bank’s funds were used to purchase the lots.”<sup>792</sup>

*Beach v. Great Western Bank.*<sup>793</sup> Judges Overton, Grimes, Harding, Wells, and Anstead concurred and Judge Shaw recused in this per curiam opinion. Before the court was the following certified question:

UNDER FLORIDA LAW, MAY AN ACTION FOR STATUTORY RIGHT OF RESCISSION PURSUANT TO THE TRUTH IN LENDING ACT, 15 U.S.C.A. SECTION 1635, BE REVIVED AS A DEFENSE IN RECOUPMENT BEYOND THE THREE-YEAR LIMIT ON THE RIGHT OF RESCISSION SET FORTH IN SECTION 1635(F)?<sup>794</sup>

The Beaches got a bank mortgage for home construction reflecting a thirty year payout. After the Beaches moved into their home, they made two payments and received another loan from Great Western Bank. They used the proceeds from that subsequent loan to pay off the initial bank mortgage. The Beaches defaulted on their mortgage and Great Western Bank sought to foreclose.<sup>795</sup>

The Beaches raised affirmative defenses in response to the foreclosure action based on their right to rescind because of overstatements made by Great Western Bank on disclosure documents and Truth in Lending Act<sup>796</sup> damage claims.<sup>797</sup> The trial court found Great Western Bank overstated the

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789. *BancFlorida*, 689 So. 2d at 1054.

790. *Id.*

791. *Id.*

792. *Id.* at 1055.

793. 692 So. 2d 146 (Fla. 1997), *cert. granted in part by sub nom.* *Beach v. Ocwen Fed. Bank*, 66 U.S.L.W. 3274 (U.S. Oct. 14, 1997).

794. *Id.* at 147.

795. *Id.* See *Beach v. Great W. Bank*, 670 So. 2d 986, 989 (Fla. 4th Dist. Ct. App. 1996).

796. 15 U.S.C. §§ 1601-67 (1994).

797. *Beach*, 692 So. 2d at 147.

Beaches monthly mortgage payment and finance charge.<sup>798</sup> The trial court also found the loan was an exempt transaction not subject to rescission, and held in Great Western Bank's favor on that issue because the Beaches did not assert rescission rights within three years of closing.<sup>799</sup> The Beaches were awarded damages as per the Truth in Lending Act because of the overstatements.<sup>800</sup> The damages were then set off against the balance Great Western still needed to receive.<sup>801</sup>

On appeal, the fourth district found rescission was not a defense for recoupment because recoupment was primarily an equitable remedy to prevent unjust enrichment.<sup>802</sup> "The district court affirmed the trial court's final judgment, holding that under Florida law the statutory right of rescission in TILA ("the Truth in Lending Act") expires three years after the transaction's closing date and may not be revived as a defense in recoupment in a creditor's foreclosure action."<sup>803</sup>

The above mentioned certified question was before the Supreme Court of Florida. The purpose of the Truth in Lending Act is to ensure a "meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit."<sup>804</sup> The consumer has the absolute right to rescind the secured transaction within three business days following closing and up to three years from the same closing date if the creditor failed to make all material disclosures.<sup>805</sup> If a borrower rescinds, he is not liable for any finance charges and a security interest given by the borrower becomes void.<sup>806</sup>

The Truth in Lending Act also allows for damages. Section 1640(e) "does not bar a person from asserting a violation . . . in an action to collect the debt . . . as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law."<sup>807</sup> This savings clause is only recognized in this particular section and is not found in section 1635, expiration of the statutory right of rescission.<sup>808</sup> The court recognized that an analysis of a Truth in Lending Act issue should include Part 226 of Title 12 of

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798. *Id.* at 147-48.

799. *Id.* at 148.

800. *Id.*

801. *Id.*

802. *Beach*, 692 So. 2d at 148.

803. *Id.*

804. *Id.* (quoting 15 U.S.C. § 1601(a) (1994)).

805. *Id.* (discussing 15 U.S.C. § 1635(f) (1994)).

806. *Id.*

807. *Beach*, 692 So. 2d. at 149 (quoting 15 U.S.C. § 1640(e) (1994)).

808. *Id.*

the *Code of Federal Regulations*,<sup>809</sup> otherwise known as Regulation Z, and the official commentary both address the right to rescission.<sup>810</sup> In Florida courts, “[i]t is well established that the defense of recoupment may be asserted defensively when the underlying claim is barred by the statute of limitations.”<sup>811</sup> The court addressed the cases relied on by the Beaches and deemed them to be inapplicable in the case at bar.<sup>812</sup> None of those cases dealt with the situation where a statute treated a right and its remedy simultaneously.<sup>813</sup>

The Supreme Court of Florida agreed with the Fourth District Court of Appeal that the real danger is that borrowers “could take advantage of the remedy throughout the entire life of the secured transaction, rendering statutory limitation meaningless.”<sup>814</sup> The three-year right of rescission expired in 1989, the Beaches defaulted in 1991, and the foreclosure was sought by Great Western in 1992.<sup>815</sup> The Beaches had control over Great Western’s ability to foreclose by making monthly payments. The remedy in the form of damages was extraneous to foreclosure. The savings clause in section 1640 saved the damages remedy beyond the one-year statute of limitations as a “defense by recoupment or setoff.”<sup>816</sup>

Section 1635(f) provided that the right and the remedy expire three years after the closing date.<sup>817</sup> This clause did not have such a savings clause regarding the right of rescission.<sup>818</sup> As a general rule, when Congress leaves out particular language in a statutory provision, and such language is provided for in another section of the same statute, it is presumed that Congress intended to omit that language from the provision.<sup>819</sup> Section 1635(f) expresses the Congressional intent to omit the statutory right of rescission three years after the transaction.<sup>820</sup>

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809. *Id.* See 12 C.F.R. § 266.23(a)(3) (1996).

810. *Beach*, 692 So. 2d at 149 (discussing *Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 219 (1981)).

811. *Id.* at 150 (quoting *Willoughby v. Dowda & Fields, Chartered*, 643 So. 2d 1098, 1099 (Fla. 5th Dist. Ct. App. 1994)).

812. *Id.*

813. *Id.*

814. *Id.* at 152 (quoting *Beach v. Great W. Bank*, 670 So. 2d 986, 991 (Fla. 4th Dist. Ct. App. 1996)).

815. *Beach*, 692 So. 2d at 152.

816. *Id.* See 15 U.S.C. § 1640 (1994).

817. *Beach*, 692 So. 2d at 152.

818. *Id.*

819. *Id.* See *Russello v. United States*, 464 U.S. 16, 23 (1983).

820. *Beach*, 692 So. 2d at 152.

The court recognized the controlling case here was *Bowery v. Babbit*<sup>821</sup> which stated “when the right and the remedy are created by the same statute, the limitations of the remedy are treated as limitations of the right.”<sup>822</sup> As such, the court held that under Florida law “an action for statutory right of rescission pursuant to 15 U.S.C. § 1635 may not be revived as a defense in recoupment beyond the three-year expiration period contained in section 1635(f).”<sup>823</sup>

*Bee Bee Medical Center, Inc. v. Strategic Consulting & Managing, Inc.*<sup>824</sup> The Second District Court of Appeal reversed the trial court’s order setting aside the clerk’s certificate of redemption after Bee Bee paid the judgment amount before attorneys’ fees and costs had been assessed.<sup>825</sup> A final judgment of foreclosure was issued to Strategic whereby they were entitled to \$125,000 plus interest.<sup>826</sup> However, Bee Bee paid the ordered amount before attorneys’ fees and costs were calculated. The court clerk issued a certificate of redemption on Bee Bee’s behalf.<sup>827</sup> Strategic filed an emergency motion asserting that Bee Bee did not pay the full amount owed because attorneys’ fees and costs were not assessed. The trial court granted Strategic’s motion and set aside the clerk’s certificate of redemption.<sup>828</sup>

The question before the district court of appeal was whether Bee Bee, as mortgagor, properly exercised their right of redemption. The district court held that Bee Bee paid the \$125,000 plus interest ordered by the judgment and therefore, properly exercised their right to redemption under section 45.0315 of the *Florida Statutes*.<sup>829</sup> The statute states that “a mortgagor may exercise redemption rights at any time before the clerk’s filing of a certificate of sale ‘by paying the amount of moneys specified in the judgment, order, or decree of foreclosure.’”<sup>830</sup> The second district recognized that Bee Bee should not be prevented from exercising redemption rights just because Strategic failed to enter attorneys’ fees and costs in its judgment.<sup>831</sup>

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821. 128 So. 801 (Fla. 1930).

822. *Beach*, 692 So. 2d at 152 (quoting *Bowery v. Babbit*, 128 So. 801, 806 (Fla. 1930)).

823. *Id.* at 153.

824. 677 So. 2d 84 (Fla. 2d Dist. Ct. App. 1996).

825. *Id.* at 84.

826. *Id.*

827. *Id.*

828. *Id.*

829. *Bee Bee*, 677 So. 2d at 85.

830. *Id.* at 84-85 (quoting FLA. STAT. § 45.0315 (1993)).

831. *Id.* at 85.

*Estepa v. Jordan*.<sup>832</sup> The Fifth District Court of Appeal of Florida reversed summary judgment granted in favor of Jordan because the record was insufficient to establish the amount of the deficiency following a mortgage foreclosure suit.<sup>833</sup> On March 31, 1995, the trial court entered judgment of foreclosure after Jordan filed a foreclosure suit against Estepa seeking payment of a promissory note, foreclosure and sale of real estate, attorneys' fees, and deficiency judgment.<sup>834</sup> Jordan bought the property at a foreclosure sale on May 11, 1995, and later filed a motion for deficiency judgment. Estepa's attorney moved for a continuance on October 20, 1995, because he was unable to reach Estepa about the suit. Estepa filed an objection to the entry of judgment on the ground that they were not personally served with notice. The trial court recognized that Estepa did not need to be served with process personally because service of notice on Estepa's attorney was adequate.<sup>835</sup> It was also found that a deficiency existed "between the fair market value of the property on the date of the foreclosure sale and the balance of the mortgage debt owed."<sup>836</sup>

The Fifth District Court of Appeal agreed that new service of process was not needed.<sup>837</sup> The law of mortgage foreclosure in Florida contemplates that a deficiency judgment may be needed in a foreclosure suit and that the deficiency proceeding should be a part of the original foreclosure suit.<sup>838</sup> The party seeking the deficiency judgment has the burden of proving that the fair market value of the property foreclosed upon was less than the total mortgage debt owed.<sup>839</sup>

In addition, the fifth district concluded that the evidence was insufficient to establish the amount of the deficiency.<sup>840</sup> The appraisal value was given twenty-seven days after the foreclosure date when the fair market value must be established on the date of the foreclosure sale.<sup>841</sup> Since the fifth district reversed the deficiency judgment, it was determined that the trial court erred in awarding Jordan interest on the full amount of the judgment through the

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832. 678 So. 2d 876 (Fla. 5th Dist. Ct. App. 1996).

833. *Id.* at 877.

834. *Id.*

835. *Id.*

836. *Id.* at 878.

837. *Estepa*, 678 So. 2d at 878.

838. *Id.*

839. *Id.*

840. *Id.*

841. *Id.*

date of the deficiency judgment.<sup>842</sup> The secured party was not entitled to the interest on the entire foreclosure after the foreclosure sale took place.<sup>843</sup>

*Goldfarb v. Daitch*.<sup>844</sup> Goldfarb appealed the trial court order that granted Daitch's "Verified Emergency Motion to Vacate Order of Disbursement of Funds" filed pursuant to rule 1.540 of the *Florida Rules of Civil Procedure*.<sup>845</sup> Federal National Mortgage Association sought to foreclose the mortgage on Daitch's residence after Daitch defaulted. Final judgment was entered against Daitch, and a foreclosure sale date was arranged.<sup>846</sup> Caro Investments, Inc. ("Caro") was the highest bidder for the property and Caro requested the court to assign the bid to Claire Blanken. Goldfarb filed a motion on behalf of Daitch seeking disbursement of surplus funds in the court's registry. Argo Mortgage Corporation ("Argo") filed its own motion for disbursement.<sup>847</sup> The trial court entered its order granting disbursement and the clerk issued a certificate of disbursement for payment to the Federal National Mortgage Association.<sup>848</sup> The trial court then issued an amended disbursement order providing disbursement to Argo, as the second mortgage holder.<sup>849</sup>

A representative for Daitch filed a "Verified Emergency Motion to Vacate Order of Disbursement of Funds." The motion alleged Daitch was unaware of Goldfarb's motion to disburse and that Goldfarb had misrepresented Daitch. The trial court ruled as to the motion and found that Goldfarb "'had no authority to represent' Daitch 'and obtain surplus funds on her behalf.'"<sup>850</sup> In addition, the trial court established "'there existed no valid attorney/client relationship by and between' Goldfarb and Daitch."<sup>851</sup> The orders to disburse the funds were vacated.<sup>852</sup>

Goldfarb appealed on the ground that the trial court exceeded its jurisdiction in entering the order to vacate disbursement.<sup>853</sup> The Fifth District Court of Appeal recognized that the law granted the trial court inherent power

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842. *Estepa*, 678 So. 2d at 878.

843. *Id.*

844. 696 So. 2d 1199 (Fla. 3d Dist. Ct. App. 1997).

845. *Id.* at 1200.

846. *Id.*

847. *Id.*

848. *Id.*

849. *Goldfarb*, 696 So. 2d at 1200.

850. *Id.* at 1203 (quoting the trial judge's order).

851. *Id.*

852. *Id.*

853. *Id.*

to vacate its own previous orders.<sup>854</sup> Daitch correctly filed her motion under rule 1.540(b) of the *Florida Rules of Civil Procedure* to raise the issue of fraud perpetrated in obtaining earlier orders.<sup>855</sup> The trial court recognized that Daitch's grant of a limited power of attorney to B.G. Gross and/or Jaime Gross was void, but that did not operate to prevent the court from considering Goldfarb's authority.<sup>856</sup> The trial court may vacate orders entered at the attorney's wishes when the attorney purports to represent a party without the authority to do so.<sup>857</sup>

*Kasket v. Chase Manhattan Mortgage Corp.*<sup>858</sup> Resolution Trust Corp. ("RTC") sought foreclosure on Kasket's home and Kasket filed affirmative defenses and alleged violations of the Truth in Lending Act ("TILA") seeking rescission of the mortgage and damages.<sup>859</sup> The trial court found Kasket could not bring affirmative defenses and counterclaims.<sup>860</sup> The Fourth District Court of Appeal affirmed the trial court's decision regarding the rescission issue, but reversed its decision to bar the affirmative defenses seeking damages.<sup>861</sup>

Kasket entered a mortgage with Carteret Savings, which was later taken over by RTC. Then, RTC sought to foreclose on the mortgage after Kasket defaulted on his payments. Kasket filed affirmative defenses and counterclaims based on section 1640 of TILA. In the meantime, Chase Manhattan Mortgage Corp. ("Chase") bought the mortgage and note from RTC. Eventually, the trial court concluded that Chase had the right to foreclose.<sup>862</sup>

The fourth district stayed the proceedings to wait for the Supreme Court of Florida's ruling in *Beach v. Great Western Bank*.<sup>863</sup> The supreme court in *Beach* held that rescission as a remedy under section 1635 of TILA could not be brought as an affirmative defense in the nature of recoupment after three years expired from the initial date of the transaction.<sup>864</sup> Since Kasket allowed the three-year period to run, the fourth district focused its attention only on the

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854. *Goldfarb*, 696 So. 2d at 1203.

855. *Id.* at 1204.

856. *Id.*

857. *Id.*

858. 695 So. 2d 431 (Fla. 4th Dist. Ct. App. 1997).

859. *Id.* at 432-33.

860. *Id.* at 433.

861. *Id.*

862. *Id.*

863. *Kasket*, 695 So. 2d at 433. See *Beach v. Great W. Bank*, 692 So. 2d 146 (Fla. 1997).

864. *Kasket*, 695 So. 2d at 433. See *Beach*, 692 So. 2d at 146.

claim for damages under TILA section 1640.<sup>865</sup> Section 1640 provides that a creditor who fails to comply with the statutory disclosure requirements is liable to his/her debtor for actual damages as well as penalty damages.<sup>866</sup> Section 1640(e) sets forth a one-year statute of limitations, but permits borrowers to claim recoupment for section 1640 damages as an affirmative defense to a creditor's action to collect the debt.<sup>867</sup> In addition, recovery by recoupment is allowable in Florida even though the limitations period has run if the "party pleads it in defense of an action brought by the opposing party in connection with the same transaction."<sup>868</sup> Although Kasket could not assert his damage claim, he could still assert his recoupment claim. However, section 1640 constitutes a civil penalty.<sup>869</sup> Under section 1612(b), government agencies are exempt from any civil or criminal penalty under TILA.<sup>870</sup> As such, section 1640 damages could not be imposed on RTC.<sup>871</sup>

The question before the fourth district was whether that exemption can also be asserted by Chase as an assignee of RTC.<sup>872</sup> The fourth district recognized that the rationale of *In re Pinder* would control.<sup>873</sup> That rationale suggested that a non-governmental assignee of a mortgage given to a debtor by a federal agency was liable for a recoupment penalty under TILA.<sup>874</sup> Section 1641 of TILA defines the liability of assignees and provides no exception from liability for voluntary assignees of governmental agencies.<sup>875</sup> However, no exemption was asserted here because the assignment from Carteret Savings to RTC was involuntary.<sup>876</sup>

Chase argued it had the right to assert all of RTC's defenses based upon the doctrine that prevents asserting of side agreements to defeat the interest of the RTC where those agreements are not in the records of the institution.<sup>877</sup> However, the fourth district court recognized that RTC or its assignees

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865. *Kasket*, 695 So.2d 433.

866. *Id.* at 434.

867. *Id.*

868. *Id.*

869. *Id.* at 435. See *Beach v. Great W. Bank*, 670 So. 2d 986 (Fla. 4th Dist. Ct. App. 1996).

870. *Kasket*, 695 So. 2d at 435.

871. *Id.*

872. *Id.*

873. *Id.* See also *Pinder v. Lomas & Nettleton Co.*, 83 B.R. 905 (Bankr. E.D. Pa. 1988).

874. *Kasket*, 695 So. 2d at 435.

875. *Id.* at 435.

876. *Id.*

877. *Id.* See also *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U.S. 447 (1942).



"needed only to review the truth in lending documents in the records of Carteret to determine whether they complied with TILA."<sup>878</sup> Mistakes in the TILA statements come from the face of the institution documents themselves. If Congress intended for RTC and its assignees to be exempt from liability for any error in financial documents, it could have provided such an exemption in the Financial Institutions Reform Recovery and Enforcement Act.<sup>879</sup> RTC was only exempted from agreements not found in the records of the institution.

In conclusion, the court held that Chase could be liable for section 1640 damages if Kasket proves Truth in Lending Act violations apparent on the face of the loan documents.<sup>880</sup> The fourth district reversed and remanded because it determined there were several issues which required findings of fact based on the evidence by the trial court.<sup>881</sup>

*Lee v. Gadasa Corp.*<sup>882</sup> The First District Court of Appeal reversed the trial court's decision because the trial court erroneously applied the doctrine of collateral estoppel.<sup>883</sup> The trial court took judicial notice of a ruling in another mortgage foreclosure case against Brock with a different plaintiff.<sup>884</sup> The trial court in that matter had applied collateral estoppel to resolve the validity of a power of attorney used by Brock's wife to secure mortgages.<sup>885</sup> According to the trial court, the doctrine of collateral estoppel could apply without identifying the parties.<sup>886</sup> The first district disagreed.<sup>887</sup> In *Zeidwig v. Ward*,<sup>888</sup> the use of defensive collateral estoppel was approved to prevent a criminal defendant, as the plaintiff, from relitigating the same issue which had already been addressed in court.<sup>889</sup> The first district distinguished *Zeidwig* from the case at bar and held there was not a comparable relationship among parties in the two suits.<sup>890</sup> As such, the narrow exception in *Zeidwig* did not apply.<sup>891</sup> In Florida, the rule has been that unless both parties were bound by

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878. *Kasket*, 695 So. 2d at 435.

879. *Id.*

880. *Id.*

881. *Id.* at 436.

882. 680 So. 2d 1107 (Fla. 1st Dist. Ct. App. 1996).

883. *Id.* at 1108.

884. *Id.* Lee was the personal representative of the estate of H. Julian Brock which was the estate in question. *Id.* at 1107.

885. *Id.*

886. *Lee*, 680 So. 2d at 1108.

887. *Id.* at 1109.

888. 548 So. 2d 209 (Fla. 1989).

889. *Lee*, 680 So. 2d at 1108 (citing *Zeidwig v. Ward*, 548 So. 2d 209, 209 (Fla. 1989)).

890. *Id.* at 1108-09.

891. *Id.*

the prior judgment, neither can use the judgment as an estoppel against the other in a later proceeding.<sup>892</sup>

*National Enterprises, Inc. v. Martin.*<sup>893</sup> The Fourth District Court of Appeal reversed and remanded the cause to the trial court.<sup>894</sup>

The Federal Deposit Insurance Corporation ("FDIC") filed an amended motion for deficiency judgment. Subsequently, National Enterprises, Inc. ("National") moved to substitute itself as the party in the case on the basis that National purchased FDIC's interest in that matter. National wanted to be able to introduce evidence concerning the transfer of the asset from FDIC to National. National's asset manager testified that he had no recollection of any assignment of an ownership interest in the note and mortgage and that he inventoried FDIC's documents evidencing indebtedness.<sup>895</sup>

The trial court granted appellee's motion for an involuntary dismissal because National had failed to prove it owned the asset by producing a written assignment of the transfer or sale of the asset from the FDIC.<sup>896</sup> National filed a motion for rehearing attaching as an exhibit an assignment from the FDIC of its interest in the final summary judgment of foreclosure. The trial court failed to grant the motion.<sup>897</sup>

National did not address *Boulevard National Bank of Miami v. Air Metals Industries, Inc.* at trial which stated that "[f]ormal requisites of such an assignment are not prescribed by statute and it may be accomplished by parol, by instrument in writing, or other mode, such as delivery of evidences of the debt, as may demonstrate an intent to transfer and an acceptance of it."<sup>898</sup> The fourth district held the trial court did not err in granting involuntary dismissal but it abused its discretion in denying National's motion for rehearing.<sup>899</sup> According to rule 1.530(a) of the *Florida Rules of Civil Procedure*, "[o]n a motion for a rehearing of matters heard without a jury, including summary judgments, the court may open the judgment if one has been entered, take additional testimony, and enter a new judgment."<sup>900</sup> The

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892. *Id.*

893. 679 So. 2d 331 (Fla. 4th Dist. Ct. App. 1996).

894. *Id.* at 332.

895. *Id.*

896. *Id.*

897. *Id.*

898. *National Enters., Inc.*, 679 So. 2d at 332 (quoting *Boulevard Nat'l Bank of Miami v. Air Metals Indus., Inc.*, 176 So. 2d 94, 97-98 (Fla. 1965)).

899. *Id.* at 333.

900. *Id.* See FLA. R. Civ. P. 1.530(a).

written assignment attached as an exhibit at trial established National's ownership by assignment of final summary judgment of foreclosure.<sup>901</sup>

*Nerbonne, N.V. v. Lake Bryan International Properties.*<sup>902</sup> Nerbonne appealed the dismissal of an entry of a final judgment of foreclosure in a mortgage foreclosure brought by Lake Bryan International Properties. Nerbonne also appealed the dismissal of its counterclaim and the striking of its affirmative defenses. Nerbonne claimed that Robert Figueredo formed Nerbonne to purchase a tract of land as an investment, and induced individuals to purchase capital stock of that corporation. The stock-offering memorandum listed the purchase price of the land but failed to disclose that Figueredo, K. Dwight Waters, and their corporation, Euro American Investment Corp., had conspired to purchase the land for a lesser amount and agreed to split the undisclosed profits when the land was resold.<sup>903</sup>

Nerbonne paid a portion of the purchase price by a \$2,550,000 mortgage to Lake Bryan which was, allegedly, a Waters entity incorporated to assist in the conspiracy.<sup>904</sup> Lake Bryan was to assist in the resale of the land by getting the purchase money mortgage, collecting payments, and assigning individual interests in the mortgage to third parties.<sup>905</sup> In 1986, Lake Bryan and Nerbonne were involved in a foreclosure of the same mortgage.<sup>906</sup> The judgment in that foreclosure was vacated and was followed by a judgment that reinstated and modified the mortgage.<sup>907</sup> At the time the modified mortgage was reinstated, Figueredo and his corporation were in control of Nerbonne and Waters was in control of Lake Bryan. The trial court granted summary judgment for Lake Bryan on the grounds that Nerbonne's action was barred by the statute of limitations and by res judicata because of the 1986 judgment.<sup>908</sup>

The fifth district agreed with Lake Bryan's contention that it had no duty to disclose to Nerbonne if it made a substantial profit upon the purchase of real estate by Nerbonne.<sup>909</sup> However, in the case at bar, Nerbonne alleged that Figueredo conspired with Waters against Nerbonne, that Figueredo provided funds for Waters to facilitate the purchase of land at a cheaper price, and then

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901. *National Enters., Inc.*, 679 So. 2d at 333.

902. 689 So. 2d 322 (Fla. 5th Dist. Ct. App. 1997).

903. *Id.* at 324.

904. *Id.*

905. *Id.*

906. *Id.*

907. *Nerbonne*, 689 So. 2d at 324.

908. *Id.*

909. *Id.* at 325.

afterwards the same land was sold to Nerbonne at a higher price.<sup>910</sup> In addition, Waters and Nerbonne calculated how the fraudulent profit would be distributed between them. It was Figueredo's duty to act in good faith and purchase the land for Nerbonne's benefit.<sup>911</sup> Parties involved with Figueredo's plan to defraud the corporation, Nerbonne, are liable to the principal Nerbonne for the loss.<sup>912</sup>

The fifth district disagreed with Lake Bryan's contention that Nerbonne was estopped from disavowing the acts of Figueredo and the indebtedness of the mortgage because Nerbonne wanted to keep the remainder of the land and recover the difference between the price paid by Waters, and the price paid by Nerbonne.<sup>913</sup> If Lake Bryan was involved with Figueredo's conspiracy, Nerbonne should only have paid \$2.4 million, the price at which Figueredo, as promoter, purchased the land for Nerbonne's benefit.<sup>914</sup>

Nerbonne raised an affirmative defense to the mortgage foreclosure and counterclaim against Lake Bryan based on fraud, but it was countered by a defense of *res judicata* on Lake Bryan's behalf.<sup>915</sup> The *res judicata* defense was grounded upon the 1987 mortgage foreclosure by Lake Bryan. The trial judge's order stated that the previously entered final judgment be set aside as null and void, that some of the terms of the manner of repayment be modified, and that otherwise, the mortgage would remain as is and fully enforceable.<sup>916</sup>

The district court recognized that the order contained no language waiving any defenses that may have been available to Nerbonne, the mortgagor.<sup>917</sup> The mortgage foreclosure proceeding leading to final judgment had no effect on defenses because the later order canceled the final judgment.<sup>918</sup> In conclusion, this court vacated the final judgment of foreclosure, the summary judgment on Nerbonne's counterclaim to Lake Bryan, and the order striking the raised affirmative defenses.<sup>919</sup>

*Saidi v. Wasko*.<sup>920</sup> The court reversed the order dismissing Saidi's objections to a judicial sale of foreclosed property because Saidi timely sought to exercise his right of redemption and was unable to do so because of the trial

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910. *Id.*

911. *Id.*

912. *Nerbonne*, 689 So. 2d at 325.

913. *Id.*

914. *Id.*

915. *Id.* at 326.

916. *Id.*

917. *Nerbonne*, 689 So. 2d at 326.

918. *Id.*

919. *Id.* at 327.

920. 687 So. 2d 10 (Fla. 5th Dist. Ct. App. 1996).

court's order.<sup>921</sup> On October 31, 1995, final judgment in favor of the Waskos provided that if \$97,166.60 was not paid, the property would be sold at a judicial sale.<sup>922</sup> Saidi was unsuccessful in his attempt to have the judicial sale postponed. As such, the property was sold to the Waskos and Saidi filed an objection to the sale and a motion to exercise right of redemption. This motion was denied.<sup>923</sup>

The fifth district recognized the right of redemption as an equitable right that the mortgagor has to reclaim his estate by paying the amount owed plus interest and costs.<sup>924</sup> Additionally, the fifth district felt that the law governing the right of redemption should be strictly construed.<sup>925</sup> Section 45.0315 of the *Florida Statutes* provides that a mortgagor could exercise redemption rights any time before certificate of title was issued.<sup>926</sup>

In this case, the final judgment of foreclosure contained a provision addressing redemption rights.<sup>927</sup> The provision stated: "[o]n filing the certificate of title Defendants and all persons claiming under or against Defendants since the filing of the notice of lis pendens shall be foreclosed of all estate or claim in the property and the purchaser at the sale shall be let into possession of the property."<sup>928</sup> According to this provision, the mortgagor's estate is terminated upon filing of the certificate of title.

The fifth district concluded that the provision in the final judgment of foreclosure had the effect of postponing the termination of Saidi's right of redemption until the certificate of title was filed.<sup>929</sup> Since a mortgagor did not need the trial court's permission to exercise the right of redemption, the fifth district decided that on remand, the trial court should order that Saidi have a period of time to exercise the right.<sup>930</sup>

## XXII. OPTIONS AND RIGHTS OF FIRST REFUSAL

*Fallschase Development Corp. v. Blakey.*<sup>931</sup> A 1975 contract of sale included the following terms: "4. Should the Seller later determine to sell all

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921. *Id.* at 11.

922. *Id.*

923. *Id.*

924. *Id.*

925. *Saidi*, 687 So. 2d at 11.

926. *Id.*

927. *Id.*

928. *Id.* at 11-12.

929. *Id.* at 12.

930. *Saidi*, 687 So. 2d at 12.

931. 696 So. 2d 833 (Fla. 1st Dist. Ct. App. 1997).

of the property retained by her as above-described, then the Buyer shall have first right of refusal to purchase said property. . . 6. This agreement shall be binding upon the parties hereto, their heirs, successors and assigns.”<sup>932</sup> Paragraph four created a right of first refusal. In 1995, the buyer’s successor brought an action to declare that the right of first refusal was void. Buyer’s successor had two theories: 1) the right of first refusal violated the rule against perpetuities; and 2) the right of first refusal was personal to the original buyer and, consequently, ended with her death in 1983. The trial court rejected the latter, concluding, that paragraph six would give the right an unlimited duration.<sup>933</sup> The First District Court of Appeal summarily agreed,<sup>934</sup> so the decision focused on the rule against perpetuities question.

Under traditional analysis, the rule against perpetuities was applied to void rights of first refusal,<sup>935</sup> although there are problems with that analysis.<sup>936</sup> However, Florida’s rule against perpetuities was amended in 1976 and 1988.<sup>937</sup> Under the 1976 amendment, the rule would not apply to rights of first refusal.<sup>938</sup> In 1988, Florida adopted the Uniform Statutory Rule Against Perpetuities which included, *inter alia*,<sup>939</sup> a provision allowing the court to “reform the disposition in the manner that the most closely approximates the transferor’s manifested plan of distribution,”<sup>940</sup> even if the nonvested interest had been created before adoption of the uniform act.<sup>941</sup>

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932. *Id.* at 835.

933. *Id.* at 834.

934. *Id.* at 834-35.

935. See Ronald Benton Brown, *An Examination of Real Estate Purchase Options*, 12 NOVA L. REV. 147, 172-80 (1987) (explaining that a right of first refusal is a purchase option that is subject to a condition precedent). See also *id.* at 192-96 (explaining the application of the rule against perpetuities and the rule against restraints on alienation to options, including rights of first refusal).

936. *Id.* at 193 (pointing out that the rule against perpetuities did not traditionally apply to future interests retained by a grantor, such as the seller here, and the propensity for courts to avoid applying the rule to options). See also *id.* at 195-96 (pointing out that the policy behind the rule does not favor its application to options and that options should properly be tested by the rule against restraints on alienation as occurred in *Inglehart v. Phillips*, 383 So. 2d 610 (Fla. 1980)).

937. See FLA. STAT. § 689.22 (1977); see also FLA. STAT. § 689.225 (1995).

938. FLA. STAT. § 689.22(3)(a)(7) (1977).

939. The Uniform Statutory Rule Against Perpetuities also provided an alternative 90 year wait-and-see provision and limited the application of the rule to gratuitous transfers. FLA. STAT. § 689.225(1)(a)(2) (amended 1990). If the Uniform version of the rule had applied, under either of these provisions, the right of first refusal could not have been adjudged *void ab initio* as occurred here. *Id.*

940. *Id.* § 689.225(6)(c).

941. *Id.*

The first district found that the right of first refusal had become void immediately in 1975 under the traditional rule.<sup>942</sup> Consequently, the title, unencumbered by the right of first refusal, had vested in the buyer at that time. The later amendments, if applied retroactively, would disturb the buyer's vested rights, and the Supreme Court of Florida recently held that "[e]ven when the Legislature does expressly state that a statute is to have retroactive application, this Court has refused to apply a statute retroactively if the statute impairs vested rights, creates new obligations, or imposes new penalties."<sup>943</sup> Judge Wolf, however, dissented on this point noting, "I am . . . unaware of a vested right to have a court strike down an obligation voluntarily undertaken as part of an enforceable written legal agreement."<sup>944</sup>

The court decided to certify the question presented as being of great public importance and formulated it as follows:

WHETHER SECTION 689.225(6)(C), FLORIDA STATUTES, IS A REMEDIAL PROVISION WHICH MAY BE APPLIED RETROSPECTIVELY TO REFORM A FIRST REFUSAL RIGHT TO PURCHASE REAL PROPERTY, SO AS TO BRING EXERCISE OF THE RIGHT WITHIN THE LIMITS OF THE COMMON LAW RULE AGAINST PERPETUITIES.<sup>945</sup>

### XXIII. PUBLIC LAND USE CONTROLS

*Martin County v. Yusem.*<sup>946</sup>

CAN A REZONING DECISION WHICH HAS LIMITED IMPACT UNDER *SNYDER*, BUT DOES REQUIRE AN AMENDMENT OF THE COMPREHENSIVE LAND USE PLAN, STILL BE A QUASI-JUDICIAL DECISION SUBJECT TO STRICT SCRUTINY REVIEW?<sup>947</sup>

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942. *Fallschase Dev. Corp. v. Blakey*, 696 So. 2d 833, 834 (Fla. 1st Dist. Ct. App. 1997), *caused dismissed by* *Charlesworth v. Mack*, No. 91-194, (Fla. Aug. 22, 1997).

943. *Id.* at 836 (quoting *State Farm v. Laforet*, 658 So. 2d 55, 61 (Fla. 1995)).

944. *Id.* at 838.

945. *Id.* at 837.

946. 690 So. 2d 1288 (Fla. 1997).

947. *Martin County v. Yusem*, 664 So. 2d 976, 982 (Fla. 4th Dist. Ct. App. 1995), *aff'd in part and quashed in part*, 690 So. 2d 1288 (Fla. 1997).

No! The Supreme Court of Florida responded to calls for clarification<sup>948</sup> by directly answering the certified question in the negative.<sup>949</sup> Both the method of judicial review and standard to be applied by the reviewing court depend on whether the governmental decision was classified as judicial or legislative in nature. Following *Snyder*<sup>950</sup> and *Puma*,<sup>951</sup> courts,<sup>952</sup> including the Fourth District Court of Appeal in this case, had applied a functional test to determine whether a decision to amend a comprehensive plan was judicial or legislative. However, the supreme court has now clearly stated that "amendments to a comprehensive land use plan which was adopted pursuant to chapter 163, Florida Statutes, are legislative decisions subject to the 'fairly debatable' standard of review."<sup>953</sup> Furthermore, "[t]his conclusion is not affected by the fact that the amendments to comprehensive land use plans are being sought as part of a rezoning application in respect to only one piece of property."<sup>954</sup> The holding was based upon the type of information that should be considered in a decision to amend the comprehensive plan and the statutory process mandated. Henceforth, the method of obtaining review of an amendment to the comprehensive plan and the standard to be applied by the reviewing court will no longer be in doubt. It will no longer be necessary to do a functional analysis to determine if a particular amendment was legislative or judicial in nature, even though that method of analysis remains in effect for determining the method and standard of review for rezoning decisions. In the future, parties aggrieved by amendments to a comprehensive plan "will know to file such challenges as original actions in the circuit court."<sup>955</sup>

*Beach v. Village of North Palm Beach City Council*.<sup>956</sup> Hoping to construct a large store, the developer sought a certificate of appropriateness from the village's planning commission. It issued the preliminary approval on February 14, 1995, and the final certificate of appropriateness was issued on May 10, 1995. To comply with the requirements of section 163.3215(4) of

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948. See e.g., Ronald Benton Brown & Joseph M. Grohman, *Property Law: 1996 Florida Survey*, 21 NOVA L. REV. 279, 338 (1996).

949. *Martin County*, 690 So. 2d at 1289.

950. *Board of County Comm'rs v. Snyder*, 627 So. 2d 469 (Fla. 1993).

951. *City of Melbourne v. Puma*, 630 So. 2d 1097 (Fla. 1994).

952. E.g., *Martin County v. Section 28 Partnership, Ltd.*, 676 So. 2d 532, 536 (Fla. 4th Dist. Ct. App. 1996), *cert. denied*, 117 S.Ct. 1553 (1997).

953. *Martin County*, 690 So. 2d at 1289.

954. *Id.* at 1293.

955. *Id.* at 1295.

956. 682 So. 2d 164 (Fla. 4th Dist. Ct. App. 1996).



the *Florida Statutes*,<sup>957</sup> opponents of the development filed a verified complaint challenging the decision to issue the certificate with the village. When relief was denied, the opponents began this court challenge, but the trial court dismissed the complaint on the theory that the verified complaint had been filed with the village too late.<sup>958</sup>

The statute required that, "[t]he verified complaint shall be filed no later than 30 days after the alleged inconsistent action has been taken."<sup>959</sup> It had been filed with the village on June 9, 1995. This was within thirty days of the issuance of the final certificate of appropriateness, but far more than thirty days after the preliminary approval. The Fourth District Court of Appeal decided that the "alleged inconsistent action" was the issuance of the final certificate.<sup>960</sup> The procedure set out in the *North Palm Beach Code* required two steps: a preliminary approval and a final approval.<sup>961</sup> The fifth district reasoned that the approval was the development order which had the effect of allowing the development to proceed and a development permit to be issued. The fourth district distinguished an earlier rezoning case in which a two step process was not involved.<sup>962</sup> Judge Stone wrote a dissenting opinion.<sup>963</sup> The *North Palm Beach Code* provided: "[s]uch [preliminary] approval will be irrevocable and makes the issuance of the certificate of appropriateness mandatory upon application, unless the final presentation does not comply in all respects with the preliminary presentation upon which the preliminary approval was based."<sup>964</sup>

Thus, the process was not really a two stage decision-making process, and the "inconsistent action" taken was the issuance of the preliminary approval. For this reason, the instant case is indistinguishable from the earlier rezoning decision.<sup>965</sup> In addition, Judge Stone disagreed with the conclusion that the issuance of the certificate of appropriateness constituted a development order.<sup>966</sup>

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957. FLA. STAT. § 163.3215(4) (1993).

958. *Beach*, 682 So. 2d at 165.

959. *Id.* (citing FLA. STAT. § 163.3215(4) (1993)).

960. *Id.*

961. *Id.* (citing *Board of Trustees v. Seminole County Bd. of County Commiss'rs*, 623 So. 2d 593 (Fla. 5th Dist. Ct. App. 1993)).

962. *Id.*

963. *Beach*, 682 So. 2d at 165 (Stone, J., dissenting).

964. *Id.* at 164 n.1 (quoting NORTH PALM BEACH, FLA. CODE § 6-56 (1996)).

965. *Board of Trustees v. Seminole County Bd. of County Comm'rs*, 623 So. 2d 593 (Fla. 5th Dist. Ct. App. 1993).

966. *Beach*, 682 So. 2d at 166 (Stone, J., dissenting).

*Chung v. Sarasota County*.<sup>967</sup> When the county rejected the landowner's rezoning petition, he filed suit. The parties reached a settlement under which the county was required to rezone the property subject to certain stipulations and conditions. A neighboring property owner and a homeowners' association intervened and objected to the settlement. After rehearing, the circuit court vacated the settlement.<sup>968</sup> The Second District of Appeal affirmed the decision based on its conclusion that the settlement constituted contract zoning.<sup>969</sup>

Contract zoning is zoning by agreement rather than by legislative process which complies with statutory and constitutional requirements. Because the government has no power to dispense with these requirements, contract zoning is *ultra vires*, i.e., beyond the legitimate powers of the government. The second district reasoned that the settlement in this case did not comply with the notice and hearing requirements of rezoning.<sup>970</sup> Any subsequent hearing would have been a sham because the city was already required to rezone the property. Consequently, the settlement was invalid.<sup>971</sup> The second district noted that this conclusion was supported by analogy to suits commenced under section 163.3215(1)<sup>972</sup> because local governments must have a public hearing on any proposed settlement.<sup>973</sup>

The second district, however, noted that the fourth district's decision in *Molina v. Tradewinds Development Corp.*<sup>974</sup> and the third district's decision in *Zoning Board of Monroe County v. Hood*<sup>975</sup> upheld similar settlements, although neither discussed contract zoning. Furthermore, it expressed concern about "impairing a local government's ability to settle litigation."<sup>976</sup> Therefore, it certified the following question as being of great public importance:

WHETHER A COUNTY OR LOCAL GOVERNMENT CAN  
ENTER INTO A SETTLEMENT AGREEMENT IN ZONING

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967. 686 So. 2d 1358 (Fla. 2d Dist. Ct. App. 1996).

968. *Id.* at 1359.

969. *Id.*

970. *Id.* at 1360.

971. *Id.*

972. *Chung*, 686 So. 2d at 1360 (citing FLA. STAT. § 163.3215(7) (1995) (allowing aggrieved parties to bring suit to prevent local governmental action that is inconsistent with the comprehensive plan)).

973. FLA. STAT. § 163.3215(1) (1995).

974. 526 So. 2d 695 (Fla. 4th Dist. Ct. App. 1988).

975. 484 So. 2d 1331 (Fla. 3d Dist. Ct. App. 1986).

976. *Chung*, 686 So. 2d at 1360.

LITIGATION WITHOUT FIRST ADHERING TO THE DUE  
PROCESS AND STATUTORY/ORDINANCE REQUIREMENTS  
FOR ENACTING THE ZONING CHANGES CONTEMPLATED  
BY THE AGREEMENT?<sup>977</sup>

*City Environmental Services Landfill, Inc. v. Holmes County.*<sup>978</sup> The landowner acquired property on which was the site of the former county landfill. By contract, the landowner assumed responsibility for closing the old landfill in return for the right to operate a landfill at that site if the environmental approvals could be obtained. The county's comprehensive plan did not have a category for landfills. When the landowner applied for a development permit to operate a regional landfill, it was informed that it would need to obtain an amendment to the comprehensive plan to create a landfill category. The proposed amendments were rejected by the planning commission and the board of county commissioners who expressly treated the decision making as legislative in nature. The landowner filed this petition for a writ of certiorari, brought suit in circuit court for a declaration that it did not need to amend the plan, and also filed suit in federal court on a claim that an ordinance that prohibited solid waste being brought in from outside the county would be unconstitutional.<sup>979</sup> Although the landowner won the federal suit, it lost the certiorari action and brought a petition for a writ of certiorari in the district court for review.<sup>980</sup>

The First District Court of Appeal denied the petition for a writ of certiorari, leaving in effect the circuit court's denial of certiorari. The court noted that in dealing with a certiorari petition "[a]t the district court level, the inquiry is limited to whether the circuit court afforded procedural due process and whether the circuit court applied the correct law."<sup>981</sup> As to the correct law,

[t]he resolution of this case hinges on whether the board of county commissioners' denial of petitioner's proposed amendments to the comprehensive land use plan was a legislative action (reviewable in a de novo hearing in a suit for injunctive or declaratory relief under the very broad "fairly debatable" standard) or a quasi-judicial

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977. *Id.* at 1361.

978. 677 So. 2d 1327 (Fla. 1st Dist. Ct. App. 1996).

979. *Id.* at 1328-31.

980. *Id.* at 1331.

981. *Id.* at 1332.

action (reviewable by certiorari under the “competent substantial evidence” standard).<sup>982</sup>

The first district simply stated that “[t]he case law indicates that the board’s action in this case was legislative, and that the circuit court therefore properly denied the petition .”<sup>983</sup> The decision seems based on the circuit court’s conclusion that, the proposed amendment to the comprehensive plan is drafted in such a way that, if adopted, it is conceivable that landfills could be situated at any location permitted by state environmental agencies. Such an amendment clearly contemplates a legislative policy-making function of Holmes County because, if approved, it would not only transfer much of the county’s authority to determine the location of landfill sites to state regulatory agencies, but would also impact the general population of Holmes County by potentially allowing numerous landfill sites to be placed through the environmental landscape of Holmes County.<sup>984</sup>

*Das v. Osceola County*.<sup>985</sup> The landowners were the defendants in a condemnation proceeding brought by Central Florida Petroleum Corporation (“CFP”) to acquire a permanent easement for a liquefied petroleum pipeline. The landowners filed a cross claim against the county seeking a writ of mandamus to enforce its comprehensive plan. The Fifth District Court of Appeal determined that “the gravamen of [the landowners’] claim is that Osceola County has not carried out its duty to conduct a public consistency review of the pipeline project and issue a valid development order granting or denying CFP permission to construct the pipeline.”<sup>986</sup>

The circuit court had dismissed the mandamus action with prejudice on the theory that the court lacked jurisdiction.<sup>987</sup> It reasoned that the sole method of challenging the pipeline project as being inconsistent with the comprehensive plan was under section 163.3215 of the *Florida Statutes*, and that the landowners had failed to pursue that remedy within the specified time period.<sup>988</sup> The fifth district reversed because that section was predicated upon affected landowners getting notice of possible governmental action that would affect their land.<sup>989</sup> In this case, the county gave neither notice to affected landowners that it was going to consider whether the pipeline was consistent

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982. *Id.* at 1332-33.

983. *Holmes County*, 677 So. 2d at 1333.

984. *Id.*

985. 685 So. 2d 990 (Fla. 5th Dist. Ct. App. 1997).

986. *Id.* at 993.

987. *Id.* at 992.

988. *Id.*

989. *Id.* at 994.

with the comprehensive plan, nor notice of the decision once it had been made. The landowners first learned of it in the condemnation proceeding. In essence, the fifth district declared that they should not be barred from challenging a decision affecting their land when they had no reasonable opportunity to learn that the decision had been made.<sup>990</sup> The fifth district concluded that “[a] county should, at the least, issue an order or permit of public record before the rights of the public to file a consistency challenge are foreclosed by the expiration of time.”<sup>991</sup>

*Debes v. City of Key West.*<sup>992</sup> The landowner sought the redesignation of her land from Medium Density Residential to Commercial General on the Future Land Use Map so that she could build a shopping center. The land was located in the center of an area designated commercial on the map and both the city planner and the planning board approved of the change. However, the city commission repeatedly refused. The commission relied upon concern for an increase in traffic and the desire to generate affordable housing. The Third District Court of Appeal, finding the commission’s refusal arbitrary, discriminatory, and unreasonable as a matter of law, reversed.<sup>993</sup>

It concluded that the increase in traffic would not justify denying a commercial use because every commercial use necessarily generates an increase in traffic.<sup>994</sup> Thus, being able to rely upon that would, in effect, give the commission free reign to deny any commercial designation. Furthermore, limiting the use of the property to affordable housing would be to ignore proper land use concepts in the decision-making process. The third district concluded that this was the inverse of spot zoning, with all of spot zoning ills.<sup>995</sup>

*Hernando County v. Leisure Hills, Inc.*<sup>996</sup> Having obtained conditional plat approval from the county’s planning and zoning commission, the developer spent more than \$500,000 to develop the subdivision. But when it sought final plat approval, the county commission decided that supplying positive drainage for the house on each two and one-half acre lot would no longer be enough. It was now requiring positive drainage for the entire lot.

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990. *Das*, 685 So. 2d at 994.

991. *Id.*

992. 690 So. 2d 700 (Fla. 3d Dist. Ct. App. 1997).

993. *Id.* at 701.

994. *Id.*

995. *Id.* at 702.

996. 689 So. 2d 1103 (Fla. 5th Dist. Ct. App. 1997).

Consequently, the developer's plat was rejected. The developer sought equitable relief based on the theory of estoppel.<sup>997</sup>

Noting, "[i]t is clear from the record that the [c]ommission was looking for a way to deny the plat . . . [.]",<sup>998</sup> the Fifth District Court of Appeal "agree[d] with the trial court that equitable estoppel was proved."<sup>999</sup> It then dealt with the county's effort to invoke *Board of County Commissioners of Brevard County v. Snyder*<sup>1000</sup> as a basis for finding that the court had no jurisdiction to hear claims for equitable relief.<sup>1001</sup> The fifth district seemed to avoid applying *Snyder* by pointing out that *Snyder* was decided years after this action was filed and the county had not raised their jurisdictional argument at that time.<sup>1002</sup> However, in the decision denying the motion for rehearing, the court stated that this was merely its "observation" and not the basis for its decision.<sup>1003</sup>

The fifth district also concluded that the commission's action was, in essence, a legislative act adopting a new policy on drainage because it would apply to all plats which would come before the commission, not just this developer's plat.<sup>1004</sup> Since *Snyder* stands for the proposition that review of a quasi-judicial decision must be by certiorari,<sup>1005</sup> it follows that *Snyder* would not bar equitable relief from this quasi-legislative decision.

The district court also found that there was also no logical reason to limit review to a certiorari petition.<sup>1006</sup> The case for estoppel might include testimony about assurances that the developer had relied upon. Such testimony would not necessarily be reflected by the commission record. Consequently, "[a]n independent, *de novo* hearing was required."<sup>1007</sup>

*Kahana v. City of Tampa*.<sup>1008</sup> The property in question was zoned YC-1, indicating that it was "in the central commercial core of the district."<sup>1009</sup> In order to sell alcoholic beverages, the owner had to petition to rezone the specific lot for that purpose. However, that rezoning would simply add that

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997. *Id.* at 1104.

998. *Id.*

999. *Id.*

1000. 627 So. 2d 469 (Fla. 1993).

1001. *Leisure Hills*, 689 So. 2d at 1104.

1002. *Id.*

1003. *Id.* at 1105.

1004. *Id.* at 1104.

1005. See Ronald Benton Brown and Joseph M. Grohman, *Property Law: 1994 Survey of Florida Law*, 19 NOVA L. REV. 215, 304-06 (1994).

1006. *Leisure Hills*, 689 So. 2d at 1104.

1007. *Id.* at 1105.

1008. 683 So. 2d 618 (Fla. 2d Dist. Ct. App. 1996).

1009. *Id.* at 619.

use to the land's YC-1 designation. At the hearing on rezoning, the parishioners of a nearby church displayed their opposition and the rezoning was denied. The landowners filed a petition for a writ of certiorari in the circuit court. The trial court concluded that the council's action was legislative and not reviewable by certiorari, so it dismissed the petition.<sup>1010</sup> The Second District Court of Appeal reversed.<sup>1011</sup>

The second district held that the circuit court had misconstrued the test for determining whether zoning activity was legislative or quasi-judicial.<sup>1012</sup> Legislative action is the formulation of a general rule of policy. Such a policy would, naturally, affect many people. In contrast, quasi-judicial activity "merely applies an existing general rule of policy to a specific parcel."<sup>1013</sup> Because "[t]here [wa]s nothing in [the] sparse record establishing the City Council formulated any general rule of policy when it voted to deny [the rezoning] petition . . . [,]"<sup>1014</sup> the trial court's decision was quashed and the case was remanded. The fifth district had not decided that the rezoning was legislative or quasi-judicial, but only that the trial court had no basis for deciding that it was legislative.<sup>1015</sup>

*Mandelstam v. City of South Miami*.<sup>1016</sup> Landowners filed suit against the city and its vice mayor alleging that the delays they had endured in finally getting approval for their gymnastics school, following protracted litigation and administrative proceedings, constituted inverse condemnation and the denial of due process. The Third District Court of Appeal quoted from a recent third district decision, stated "there is no guarantee that regulatory bodies will not become embroiled in disputed [sic] with property owners in which the owners ultimately will prevail."<sup>1017</sup> Furthermore, the court stated "there is no concomitant guarantee that property owners may recover for harm caused by these disputes."<sup>1018</sup> Due process requires that the city employ fair procedures, not that it must always make the correct decision.<sup>1019</sup> The fact that the final approval took so long was not enough to justify a finding of

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1010. *Id.*

1011. *Id.* at 619-20.

1012. *Id.*

1013. *Kahana*, 683 So. 2d at 620 (interpreting Board of County Commiss'rs of Brevard County v. Snyder, 627 So. 2d 469 (Fla. 1993)).

1014. *Id.*

1015. *Id.*

1016. 685 So. 2d 868 (Fla. 3d Dist. Ct. App. 1996).

1017. *Id.* at 869 (quoting *Jacobi v. City of Miami Beach*, 678 So. 2d 1365 (Fla. 3d Dist. Ct. App. 1996)).

1018. *Id.*

1019. *Id.*

liability.<sup>1020</sup> Moreover, the vice mayor was entitled to qualified immunity because there was no allegation that she had acted with malice or contrary to clearly established law.<sup>1021</sup>

*Monroe County v. Whispering Pines Associates.*<sup>1022</sup> A mobile home park covered three lots. Mobile homes were permitted on two of the lots, but prohibited by the zoning on the third lot. The owner obtained permits to place three mobile homes on lots where they were allowed by the zoning, but the mobile homes were actually placed on the lot where they were prohibited. This was an unpleasant surprise for the subsequent purchaser of the park because when the building officials discovered it, they revoked the building permits and gave the park owner ninety days to remove the homes. It did not comply, so this code enforcement proceeding was initiated.<sup>1023</sup>

The Monroe County Code Enforcement Board gave the park owner seven months to remove the mobile homes or obtain a variance, and set the fine for noncompliance at \$100 per day. The owner appealed to the circuit court which remanded the case with the direction to join the mobile home owner.<sup>1024</sup> The Third District Court of Appeal, however, reinstated the Monroe County Code Enforcement Board's order.<sup>1025</sup> The third district found that the current owner can be cited for code violations even though the improper use was actually begun by the prior owner.<sup>1026</sup> The current owner is the only one to have the power to bring the property into compliance. Thus, it concluded, "code violations 'run with the land'"<sup>1027</sup> and the current owner could be fined for failing to bring the property into compliance where it had been given time to comply or get a variance.<sup>1028</sup>

*Sunshine Key Associates Ltd. Partnership v. Monroe County.*<sup>1029</sup> The *Monroe County Code* specified land use districts that were designated for recreational vehicles. The county's director of planning decided that the county code did not allow "park models,"<sup>1030</sup> i.e., expandable recreational vehicles over eight feet wide that were designed and built to be permanent

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1020. *Id.* at 869-70.

1021. *Mandelstam*, 685 So. 2d at 870.

1022. 697 So. 2d 873 (Fla. 3d Dist. Ct. App. 1997).

1023. *Id.* at 874-75.

1024. *Id.* at 875.

1025. *Id.*

1026. *Id.*

1027. *Whispering Pines*, 697 So. 2d at 875.

1028. *Id.*

1029. 684 So. 2d 876 (Fla. 3d Dist. Ct. App. 1996).

1030. *Id.* at 877.



residences.<sup>1031</sup> When the county tried to enforce that interpretation, this recreational vehicle park filed an unsuccessful administrative appeal to the County Planning Commission. Subsequently, the park unsuccessfully sought declaratory and injunctive relief, as well as damages, in the circuit court.<sup>1032</sup> Finally, in the Third District Court of Appeal, they succeeded.<sup>1033</sup>

The third district noted that the essence of the park's argument was that the eight-foot maximum width was arbitrary.<sup>1034</sup> As a constitutional claim, apparently a due process violation, it was not barred by administrative res judicata.<sup>1035</sup> The next step in the analysis was that recreational vehicles, unlike mobile homes, were designed for tenancies of less than six months and were "highway ready."<sup>1036</sup> Both parties conceded at oral argument that "the [RV] industry is moving towards wider vehicles."<sup>1037</sup> Furthermore, in all other attributes, these trailers met the criteria for recreational vehicles. Therefore, the third district concluded the eight-foot maximum width was arbitrary and unenforceable.<sup>1038</sup>

#### XXIV. Remedies

*Nystrom v. Cabada*.<sup>1039</sup> Nystrom, who was not a licensed contractor, built his own house in Naples. After living in the house for about one year, he sold it to Cabada for \$126,000. Cabada then sued after she experienced problems with walls cracking and doors sticking. Engineers inspected the property and reported it to be hazardous. Cabada alleged "breach of implied warranty, fraud, rescission of contract, breach of contract, negligence, and intentional violation of the Collier County Building Code."<sup>1040</sup> The trial court gave her the option to rescind the purchase and obtain her payment of \$126,000, or to take \$126,000 in damages and keep the property.<sup>1041</sup> Of course, she kept the property, chose the judgment, and continued to live in the house. The Second District Court of Appeal affirmed on the issue of liability,

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1031. See MONROE COUNTY FLA. CODE § 9.5-4. See also *Sunshine Key*, 684 So. 2d at 877 n.1.

1032. *Sunshine Key*, 684 So. 2d at 877.

1033. *Id.* at 878.

1034. *Id.*

1035. *Id.*

1036. *Id.* at 877 n.1. See also MONROE COUNTY FLA. CODE § 9.5-4.

1037. *Sunshine Key*, 684 So. 2d at 878.

1038. *Id.*

1039. 652 So. 2d 1266 (Fla. 2d Dist. Ct. App. 1995).

1040. *Id.* at 1267.

1041. *Id.* at 1268.

holding that the Nystroms had a duty to disclose both the defects and the fact that the house was built by an unlicensed contractor.<sup>1042</sup> The second district reversed on the issue of damages holding that Cabada should not have been given the option of obtaining a money judgment for the full purchase price of the property and keeping the property.<sup>1043</sup> The second district remanded for a new trial on the issue of damages.<sup>1044</sup>

## XXV. Sales

*Gilchrist Timber Co. v. ITT Rayonier, Inc.*<sup>1045</sup> The seller of a 22,000 acre tract provided the buyer with a year-old appraisal. Unfortunately, the zoning shown on the appraisal was inaccurate. After “unsuccessfully” trying to get the zoning changed, the buyer filed suit in federal district court.<sup>1046</sup> When the case reached the United States Court of Appeals for the Eleventh Circuit, it certified the following question to the Supreme Court of Florida:

WHETHER A PARTY TO A TRANSACTION WHO TRANSMITS FALSE INFORMATION WHICH THAT PARTY DID NOT KNOW WAS FALSE, MAY BE HELD LIABLE FOR NEGLIGENT MISREPRESENTATION WHEN THE RECIPIENT OF THE INFORMATION RELIED ON THE INFORMATION'S TRUTHFULNESS, DESPITE THE FACT THAT AN INVESTIGATION BY THE RECIPIENT WOULD HAVE REVEALED THE FALSITY OF THE INFORMATION.<sup>1047</sup>

To simplify matters, this question could be broken into two parts. First, could this seller be held liable for the misinformation in the appraisal which it gave the buyer when there was no evidence of fraudulent intent? Yes, was the court's answer.<sup>1048</sup> It relied upon section 552 of the Restatement (Second) of Torts for the proposition that a person “in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in

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1042. *Id.*

1043. *Id.*

1044. *Nystrom*, 652 So. 2d at 1268.

1045. 696 So. 2d 334 (Fla. 1997).

1046. *Id.* at 336.

1047. *Id.* at 335.

1048. *Id.* at 337.

their business transactions, is subject to liability . . . if he fails to exercise reasonable care.”<sup>1049</sup> However, the question has a second part: Does the buyer have a right to rely upon that information when a reasonable person would have sought independent verification? Where the misrepresentation was negligent rather than intentional, the answer was in the negative.<sup>1050</sup> The Restatement (Second) of Torts provides that liability only extends to a person who justifiably relies on that information,<sup>1051</sup> and the court expressly adopted the position as expressed in section 552 of the Restatement (Second) of Torts.<sup>1052</sup> Consequently, this seller should be held liable only if the seller failed to exercise reasonable care in giving the appraisal to the buyer and if the buyer was justified in relying on that appraisal without further checking.

The court further noted that Florida uses comparative fault to apportion damages in negligence cases.<sup>1053</sup> Since the seller in this case was accused of negligently supplying incorrect information to the buyer, comparative fault should be applied. In this case, the buyer might have been negligent in failing to communicate the purpose for which it was acquiring the property or in failing to verify the zoning. Thus, the negligent seller may ultimately be liable for little or nothing if the buyer was also negligent.

*Decker v. Strom & Strom Realtors, Inc.*<sup>1054</sup> The buyers apparently had a bad credit history so the only loan the broker could locate was at an interest rate above the current market. When the buyers realized how high the payments would be, they refused to close. The sale was subject to financing under the standard Sarasota County Board of Realtors and the Sarasota County Bar Association purchase contract that had been used; however, that clause was silent as to interest rates. The Second District Court of Appeal reluctantly held that the buyers had breached the contract.<sup>1055</sup> It is unclear whether this court was saying that the clause should be interpreted to allow buyers to cancel if unable to find reasonable financing, or that buyers could not cancel unless they were unable to find any financing. The Second District Court of Appeal only stated that this financing was reasonable in light of the buyers’ credit history.<sup>1056</sup> However, the court noted that the buyers would

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1049. *Id.*

1050. *Gilchrist*, 696 So. 2d at 339.

1051. *See id.* (distinguishing *Lynch v. Fanning*, 440 So. 2d 79 (Fla. 1st Dist. Ct. App. 1983)).

1052. *Id.*

1053. *Id.* at 338 (citing FLA. STAT. § 768.81 (1995)).

1054. 695 So. 2d 803 (Fla. 2d Dist. Ct. App. 1997).

1055. *Id.* at 803.

1056. *Id.*

have been better off using the standard Florida Bar contract because it has a space for the buyer to specify a maximum acceptable interest rate.<sup>1057</sup>

*Miami Child's World, Inc. v. City of Miami Beach.*<sup>1058</sup> The purchase and sale contract had a clause providing that time was of the essence, but it also provided for a three-month extension if the buyer paid an extension fee. The buyer paid the fee and got the extension. At the end of the three months, the buyer was still not ready to close and asked for an eighteen-month extension. The seller agreed only to a four-month extension. As the deadline neared, the buyer asked the seller to extend for another year. The seller responded by giving a three-week extension. When the buyer again could not meet the deadline, the seller gave notice of termination, but the buyer then claimed that the seller had waived the "time is of the essence" clause.<sup>1059</sup>

The trial court rejected that claim and the district court of appeal affirmed.<sup>1060</sup> Noting that the only basis for the buyer's waiver argument was the sellers "patience and forbearance evidenced by its repeated granting of extensions,"<sup>1061</sup> the court held that, "[a]s a matter of law, the [seller's] repeated extensions of the closing date did not amount to a waiver of the 'time is of the essence' clause."<sup>1062</sup> Clearly, the court was correct. Waiver is an intentional or voluntary act. The seller's conduct here did not evidence an intent to relinquish tight control over the time for performance.

*Licea v. Anllo.*<sup>1063</sup> The buyer brought this suit for specific performance of a real estate sales contract and filed a notice of lis pendens. In response, the seller filed a motion to discharge the lis pendens or, in the alternative, require the buyer to post a bond. Over the buyer's objection, the court set the hearing on its motion calendar and then set the bond without an evidentiary hearing.<sup>1064</sup> The district court of appeal held that to be reversible error.

The court reasoned that the property owner could prevail in its motion for the setting of a bond only if it could show: "(1) that the notice of lis pendens, if unjustified, will likely result in loss or damage, and (2) the amount of the damages which will likely result."<sup>1065</sup> The first element would be to determine if a bond was required. The second element would be to determine the proper amount of the bond. The property owner could not make the

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1057. *Id.*

1058. 688 So. 2d 942 (Fla. 3d Dist. Ct. App. 1997).

1059. *Id.* at 943.

1060. *Id.*

1061. *Id.*

1062. *Id.*

1063. 691 So. 2d 29 (Fla. 3d Dist. Ct. App. 1997).

1064. *Id.* at 30.

1065. *Id.*

required showing without evidence; therefore, the trial court should not have set the bond without an evidentiary hearing.<sup>1066</sup>

## XXVI. Taxes

*Alachua County v. Adams.*<sup>1067</sup> At issue was the “validity of a special act permitting Alachua County to use tax revenues raised under a general law for a purpose not enumerated in . . . that general law.”<sup>1068</sup> Section 212.055(2) of the *Florida Statutes*, a general law, “authorizes Florida counties to levy an infrastructure surtax and use the proceeds” for enumerated purposes.<sup>1069</sup> The “proceeds . . . nor any interest accrued thereto shall be used for operational expenses of any infrastructure.”<sup>1070</sup> In addition, chapter 94-487, *Laws of Florida*, expanded section 212.055(2) “to allow Alachua County and its municipalities to use the surtax revenues ‘for operation and maintenance of parks and recreation programs and facilities established with proceeds of the surtax.’”<sup>1071</sup>

Alachua County and its municipalities entered an agreement under the two statutes to “provide for the dedication of the use of Surtax proceeds by the County and all municipalities within the County . . . provision and operation of recreation programs in the implementation of a countywide recreation partnership.”<sup>1072</sup> Adams, as a taxpayer, sought an injunction and claimed chapter 94-487 was unconstitutional.<sup>1073</sup> The lower court agreed and Alachua County appealed.<sup>1074</sup>

Alachua County relied upon *Rowe v. Pinellas Sports Authority*.<sup>1075</sup> In *Rowe*, the county was pursuing the purpose of building a stadium specifically authorized by general law.<sup>1076</sup> The court recognized that the same situation was not occurring here.<sup>1077</sup> Alachua County was attempting, under chapter

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1066. *Id.*

1067. 677 So. 2d 396 (Fla. 1st Dist. Ct. App. 1996).

1068. *Id.* at 397.

1069. *Id.*

1070. *Id.*

1071. *Id.*

1072. *Adams*, 677 So. 2d at 397.

1073. *Id.*

1074. *Id.*

1075. 461 So. 2d 72 (Fla. 1984).

1076. *Adams*, 677 So. 2d at 397. *See also* *Rowe v. Pinellas Sports Auth.*, 461 So. 2d 72, 74 (Fla. 1984).

1077. *Adams*, 677 So. 2d at 398.

94-487, to use tax revenues for the specific objective of maintaining an infrastructure which was not authorized by general law.<sup>1078</sup>

When a taxing statute specifically sets out the ultimate use for revenues collected pursuant to the statute, a change in the use must be considered a change in the tax.<sup>1079</sup> Appellants also contend there was a distinction between the power to tax and the power to spend and that only the power to tax must be authorized by general law.<sup>1080</sup> The court held this distinction to be unpersuasive.<sup>1081</sup> The First District Court of Appeal affirmed the lower court and held chapter 94-487 to be an unconstitutional special act.<sup>1082</sup>

*Appleby v. Nolte*.<sup>1083</sup> The Fourth District Court of Appeal reversed a final judgment entered in favor of the Indian River County Property Appraiser.<sup>1084</sup> The appellants contested the assessed value of their homes for ad valorem tax purposes.<sup>1085</sup> They were residents and equity members entitled to full golf privileges of John's Island Club, a Florida corporation.<sup>1086</sup> Full golf members, as with the other equity members with lesser privileges, would receive a proportionate share of property and assets at the club's dissolution after outstanding debts were satisfied. When the property was appraised, the appraiser considered the type of membership when determining appraisal value.<sup>1087</sup> Individuals owning homes with full golf memberships were assessed forty percent higher than all other residents having lesser club privileges. At trial, appellants argued that increasing the value assessment of their homes based on the full golf membership was an inappropriate ad valorem tax on intangible property.<sup>1088</sup> The trial court disagreed and held that the ability to obtain the full golf membership added value to the property which was "reflected in the sales price."<sup>1089</sup>

Appellants brought the same issue before the Fourth District Court of Appeal. The Florida Constitution prohibited "counties from levying ad valorem taxes on intangible personal property."<sup>1090</sup> Section 192.001(11)(b) of

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1078. *Id.* at 398.

1079. *Id.*

1080. *Id.*

1081. *Id.*

1082. *Adams*, 677 So. 2d at 398.

1083. 682 So. 2d 1140 (Fla. 4th Dist. Ct. App. 1996).

1084. *Id.* at 1140.

1085. *Id.*

1086. *Id.*

1087. *Id.* at 1141.

1088. *Appleby*, 682 So. 2d at 1141.

1089. *Id.*

1090. *Id.* See also FLA. CONST. art VII, § 9(a) (1968).

the *Florida Statutes* defined intangible personal property as ““money, all evidences of debt owed to the taxpayer, **all evidences of ownership in a corporation** or other business organization having multiple owners.””<sup>1091</sup> Likewise “[m]embership [c]ertificates” fit the above definition.”<sup>1092</sup> The appraiser had based his assessment “partially on the value of the real property, and partially on evidence of ownership in a corporation” which violated article VII, section 9 of the Florida Constitution.<sup>1093</sup> An ad valorem tax can not be based on the fact that appellants possessed scarce full golf memberships.<sup>1094</sup>

In addition, the appraiser based the assessments on who owned the property. If the golf member owned a residential unit, the assessment would be one amount. However, a member who does not golf, owning the same unit, would be assessed a lower amount.<sup>1095</sup> The Supreme Court of Florida has previously held this was not a valid criterion for valuing property.<sup>1096</sup>

*Canaveral Port Authority v. Department of Revenue*.<sup>1097</sup> Justice Wells wrote the court’s opinion with Chief Justice Kogan, and Justices Grimes and Harding concurring, and with Justice Overton dissenting with an opinion with which Justices Shaw and Anstead concurred.<sup>1098</sup> The case at bar conflicted with the opinion in *Sarasota-Manatee Airport Authority v. Mikos*.<sup>1099</sup>

Canaveral challenged Brevard County’s authority to assess ad valorem taxes pursuant to section 196.199(4) of the *Florida Statutes* “on the fee interest of real property owned by Canaveral and leased to private entities engaged in nongovernmental activities.”<sup>1100</sup> Canaveral contended it was not subject to taxation “because it was a political subdivision” or otherwise, “exempt from taxation pursuant to” section 315.11 of the *Florida Statutes*.<sup>1101</sup>

The trial court found, in accord with the *Sarasota-Manatee* court, that Canaveral was a political subdivision and was immune from ad valorem taxation.<sup>1102</sup> The Fifth District Court of Appeal reversed and the Supreme

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1091. *Appleby*, 677 So. 2d at 1142 (quoting FLA. STAT. § 192.001(11) (1993)).

1092. *Id.* at 1142.

1093. *Id.*

1094. *Id.*

1095. *Id.*

1096. *Appleby*, 677 So. 2d at 1142. *See also* *Interlachen Lake Estates, Inc. v. Snyder*, 304 So. 2d 433 (Fla. 1973).

1097. 690 So. 2d 1226 (Fla. 1996).

1098. *Id.* at 1230.

1099. *Id.* at 1227. *See also* *Sarasota-Manatee Airport Auth. v. Mikos*, 605 So. 2d 132 (Fla. 2d Dist. Ct. App. 1992).

1100. *Canaveral*, 690 So. 2d at 1227. *See also* FLA. STAT. § 196.199(4) (1991).

1101. *Canaveral*, 690 So. 2d at 1227. *See also* FLA. STAT. § 315.11 (1991).

1102. *Canaveral*, 690 So. 2d at 1227.

Court of Florida agreed that Canaveral's fee simple interest in property was not immune from taxation.<sup>1103</sup>

Immunity from taxation must be kept within limited bounds.<sup>1104</sup> As such, only the state and those entities expressly recognized in the Florida Constitution as performing a function of the state comprised "the state" for purposes of tax immunity.<sup>1105</sup> Since Canaveral did not meet the level as to be declared "the state," Canaveral must be taxed.<sup>1106</sup>

The court in *Sarasota-Manatee* held that immunity from taxes was based upon whether an entity was more like a county than a municipality.<sup>1107</sup> This court rejected that view.<sup>1108</sup> Immunity does not flow from a judicial determination that the entity is like a county.<sup>1109</sup> This court also rejected the *Sarasota* decision that the Sarasota-Manatee Airport Authority was a "political subdivision" as declared by the legislature.<sup>1110</sup> The *Sarasota-Manatee* court recognized that the Florida Constitution did not allow the legislature to decide which entities were immune from ad valorem taxation.<sup>1111</sup>

Since Canaveral was not immune from taxation, Canaveral also argued in the alternative that it was exempt from ad valorem taxation under section 315.11 of the *Florida Statutes*.<sup>1112</sup> Section 315.11 provided a statutory exemption from taxes for port authorities and their properties.<sup>1113</sup> Canaveral contended that sections 196.001 and 196.199 of the *Florida Statutes* superseded section 315.11 and made Canaveral's leased property taxable to the extent the property was not subject to governmental use.<sup>1114</sup> Section 196.001 of the *Florida Statutes* states that all property is subject to taxation unless expressly exempted.<sup>1115</sup> Section 196.001 establishes exemptions that apply to Canaveral property leased to non-governmental agencies.<sup>1116</sup>

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1103. *Id.*

1104. *Id.*

1105. *Id.* at 1228.

1106. *Id.*

1107. *Canaveral*, 690 So. 2d at 1228. *See also Sarasota-Manatee*, 605 So. 2d 132, 133 (Fla. 2d Dist. Ct. App. 1992).

1108. *Canaveral*, 690 So. 2d at 1228.

1109. *Id.*

1110. *Id.* *See also Sarasota-Manatee*, 605 So. 2d at 133.

1111. *Canaveral*, 690 So. 2d at 1228.

1112. *Id.*

1113. *Id.* *See also* FLA. STAT. § 315.11 (1991).

1114. *Canaveral*, 690 So. 2d at 1229.

1115. *Id.* *See also* FLA. STAT. § 196.001 (1991).

1116. *Canaveral*, 690 So. 2d at 1229. *See also* FLA. STAT. § 196.199 (1991).



The Supreme Court of Florida recognized that by the term "authorities" used in sections 196.001 and 196.199(a)(4), "the legislature intended to provide only a limited exemption for fee interests in port authority property."<sup>1117</sup> This court construed section 315.11 of the *Florida Statutes* with sections 196.001 and 196.199 and held that "section 315.11 provide[d] an exemption only when port authority property [was] being used for a purpose which [was] specifically set forth in section 196.199(2) and (4)."<sup>1118</sup> As long as the property was being used for some other purpose not set out in the statute, the fee interest would be taxable.<sup>1119</sup>

In conclusion, "the fee interest in the property at issue [was] not exempt from . . . taxation because the property [was] leased to a nongovernmental entity for a nongovernmental [purpose]."<sup>1120</sup> In addition, property could only be taxed on its total appraised value.<sup>1121</sup> The leased property was not to be taxed twice by assessing both the leasehold and the fee in a way that the value of the leasehold included the fee, or that the value of the fee, included the leasehold. The two must be taxed separately.

Subsequently, Chief Justice Kogan and Justices Grimes, Harding, and Wells concurred as to the petitioner's motion for rehearing and Justices Overton, Shaw, and Anstead dissented.<sup>1122</sup> Chief Justice Kogan and Justices Overton, Shaw, Grimes, Harding, Wells, and Anstead concurred as to the respondent's motion for clarification.<sup>1123</sup> Motions for rehearing and clarification filed on behalf of both parties were considered and denied.<sup>1124</sup>

*Florida Department of Revenue v. Pirtle Construction Co.*<sup>1125</sup> This court reversed the trial court's decision and construed section 199.185(1)(d) of the *Florida Statutes* to mean Pirtle's receivables were not exempt from intangible tax.<sup>1126</sup> Pirtle, a general contractor, established construction contracts with the school board for the 1988 and 1991 tax periods. Pirtle claimed exempt intangibles as accounts receivable on his books and records. Later, Pirtle applied to the Department of Revenue for a refund of the intangible taxes

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1117. *Canaveral*, 690 So. 2d at 1229.

1118. *Id.*

1119. *Id.*

1120. *Id.* at 1229-30.

1121. *Id.* at 1230.

1122. *Canaveral*, 690 So. 2d at 1230.

1123. *Id.*

1124. *Id.*

1125. 690 So. 2d 709 (Fla. 4th Dist. Ct. App. 1997).

1126. *Id.* at 710. *See also* FLA. STAT. § 199.185(1)(d) (1991).

paid, and the Department declined. The Circuit Court ruled in Pirtle's favor.<sup>1127</sup>

Pirtle relied on section 199.185(1)(d) of the *Florida Statutes* which stated, "'(1) The following intangible personal property shall be *exempt* from the annual and nonrecurring taxes imposed by this chapter: . . . (d) Notes, bonds, and *other obligations issued* by the State of Florida . . .'"<sup>1128</sup> Pirtle contended the accounts receivables are "other obligations" that are exempt. The court recognized that the construction of the words "other obligations issued" was warranted.<sup>1129</sup> The court looked to legislative intent and turned to "the doctrine of *ejusdem generis*," a "tenet of statutory construction that helps discern legislative intent."<sup>1130</sup> In addition, the court stated that "where the enumeration of specific things is followed by a more general word or phrase, the general phrase is construed to refer to a thing of the same nature as the preceding specific things."<sup>1131</sup>

Therefore, "because the general language 'and other obligations' follow[ed] the specific enumeration of the words 'note' and 'bond,' the principle of *ejusdem generis*" allowed the court to properly interpret the statute.<sup>1132</sup> Also, "[t]he Legislature could not have intended 'other obligations issued' . . . to include accounts receivable arising from a government contract because those accounts receivable are not of the same nature of notes and bonds."<sup>1133</sup> Once the government issues notes or bonds, full faith and credit is pledged for later payment.<sup>1134</sup> This is not the case when a construction contract is entered.<sup>1135</sup>

The court compared the language here to the statutory language appearing in *Smith v. Davis*.<sup>1136</sup> In *Smith*, "'all stocks, bonds, Treasury notes, and other obligations of the United States'" were exempt.<sup>1137</sup> The *Smith* court applied *ejusdem generis* and held "other obligations" referred only to obligations or securities of the same type as those specifically enumerated

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1127. *Pirtle*, 690 So. 2d at 710.

1128. *Id.* at 711 (quoting FLA. STAT. § 199.195(1)(d) (1991)).

1129. *Id.*

1130. *Id.*

1131. *Id.* (citing *Hanna v. Sunrise Recreation, Inc.*, 94 So. 2d 597, 599-600 (Fla. 1957)).

1132. *Pirtle*, 690 So. 2d at 711.

1133. *Id.* at 712.

1134. *Id.*

1135. *Id.*

1136. *Id.* See also *Smith v. Davis*, 323 U.S. 111, 116 (1944).

1137. *Pirtle*, 690 So. 2d at 712 (quoting *Smith v. Davis*, 323 U.S. 111, 116 (1944)).

such as stocks, bonds, and Treasury notes.<sup>1138</sup> Legislative intent was to limit exemptions only to government obligations needed to secure credit to carry on necessary government functions.<sup>1139</sup> Since the language was nearly identical to that in the *Smith* case, the result should be the same here.<sup>1140</sup> The court reversed and remanded.<sup>1141</sup>

*Leon County Educational Facilities Authority v. Bert Hartsfield*.<sup>1142</sup> Justice Grimes wrote the court's opinion and Chief Justice Kogan and Justices Overton, Shaw, Harding, Wells, and Anstead concurred.<sup>1143</sup> Leon County Educational Facilities Authority was organized to own, lease, and finance higher educational facilities.<sup>1144</sup> Authority entered into a lease with SRH, Inc. where SRH would acquire, construct, and equip the dormitory and food service project and then lease it to Authority in exchange for rent. Authority was responsible for maintenance, insurance, and any taxes assessed against the property.<sup>1145</sup> Although the project received a tax exemption in 1992, it was denied exemption in 1993.<sup>1146</sup> Authority and SRH sued the appraiser for declaratory relief and the trial court found in favor of the property appraiser.<sup>1147</sup>

The First District Court of Appeal affirmed based on sections 196.192 and 196.199 of the *Florida Statutes*.<sup>1148</sup> Authority was not entitled to a tax exemption because SRH held legal title to the project.<sup>1149</sup> This court recognized the concept of equitable ownership in ad valorem taxation and pointed out cases illustrating such.<sup>1150</sup> The court stated that "the doctrine . . . should be applied evenhandedly regardless of whether a tax is being imposed or an exemption being claimed."<sup>1151</sup> The court pointed out the issue as turning on whether the Authority has equitable ownership of the project.<sup>1152</sup> The court believed "the project [was] exempt from taxation because the

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1138. *Smith*, 323 U.S. at 117.

1139. *Pirtle*, 690 So. 2d at 712.

1140. *Id.*

1141. *Id.*

1142. 698 So. 2d 526 (Fla. 1997).

1143. *Id.* at 530.

1144. *Id.* at 527.

1145. *Id.*

1146. *Id.*

1147. *Leon*, 698 So. 2d at 527.

1148. *Id.*

1149. *Id.* at 528.

1150. *Id.* at 528-29. See *Bancroft Inv. Corp. v. City of Jacksonville*, 27 So. 2d 162 (Fla. 1946); *Hialeah, Inc. v. Dade County*, 490 So. 2d 998 (Fla. 3d Dist. Ct. App. 1986).

1151. *Leon*, 698 So. 2d at 529.

1152. *Id.*

Authority [was] the equitable owner.”<sup>1153</sup> Section 243.33 of the *Florida Statutes* was written with the intent to exempt a project operated and maintained by an authority under taxation provisions.<sup>1154</sup> The legislature would not intend property being used by the Authority to be denied a tax exemption because it did not hold legal title.<sup>1155</sup> SRH held legal title to facilitate financing for the project, not to make profit. It was insignificant that the Authority did not automatically gain legal title at the leasehold’s end.<sup>1156</sup>

The amendment to section 196.192(1) of the *Florida Statutes* which added the words “owned by an exempt entity” did not prevent the Authority, as equitable owner, from obtaining a tax exemption.<sup>1157</sup> Section 196.011(1) also did not prevent a tax exemption for the project.<sup>1158</sup> This section supports a conclusion that the owner of property for the purpose of obtaining a tax exemption could be one who has been determined to be an equitable owner.<sup>1159</sup> The facts of this case forced the court to hold that the project was not subject to ad valorem taxation because the Authority held all the benefits and burdens of ownership.<sup>1160</sup>

*Palmer Trinity Private School v. Robbins*.<sup>1161</sup> Palmer Trinity appealed an order granting final summary judgment in favor of Robbins, the property appraiser of Dade County.<sup>1162</sup> In 1988, Palmer Trinity applied for an educational tax exemption from ad valorem taxes for the private school.<sup>1163</sup> After the application was denied, Palmer petitioned the Property Appraisal Adjustment Board who approved the exemption at the special master’s recommendation.<sup>1164</sup> On August 25, 1989, the property appraiser filed suit challenging the exemption, but the circuit court later said no exemption would apply.<sup>1165</sup> The Third District Court of Appeal reversed the circuit court’s decision and found that the private school was qualified to receive the educational exemption.<sup>1166</sup>

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1153. *Id.*

1154. *Id.*

1155. *Id.*

1156. *Leon*, 698 So. 2d at 529.

1157. *Id.* at 530 (quoting FLA. STAT. §196.192(1) (1988)).

1158. *Id.*

1159. *Id.*

1160. *Id.*

1161. 681 So. 2d 809 (Fla. 3d Dist. Ct. App. 1996).

1162. *Id.* at 809.

1163. *Id.*

1164. *Id.*

1165. *Id.*

1166. *Palmer*, 681 So. 2d at 809.

Section 196.011 of the *Florida Statutes* required the property appraiser to mail a renewal application for exemption on or before February 1 “once an original application for tax exemption had been granted.”<sup>1167</sup> The appraiser failed to send a renewal application to Palmer for 1989 because the appraiser believed the renewal application was only for those granted a tax exemption in the previous year and not to those whose exemption was still in litigation at the appeal level.<sup>1168</sup> The appraiser did mail notice of the proposed tax assessment to Palmer and later mailed the actual bill.<sup>1169</sup>

While litigating, Palmer sold the property to the Board of Trustees of the State of Florida.<sup>1170</sup> Palmer agreed to pay the 1989 ad valorem taxes to release the tax lien.<sup>1171</sup> Palmer, not receiving a refund for the 1989 taxes, brought suit challenging the assessment of ad valorem taxes for the 1989 year.<sup>1172</sup> The circuit court held it did not have jurisdiction because Palmer had not filed the action contesting assessment within sixty days from the date the assessment was certified for collection.<sup>1173</sup> Section 194.171(2) of the *Florida Statutes* provided that:

No action shall be brought to contest a tax assessment after 60 days from the date the assessment being contested is certified for collection under section 193.122(2), or after 60 days from the date a decision is rendered concerning such assessment by the property adjustment board if a petition contesting the assessment had not received final action by the property appraisal adjustment board prior to extension of the roll under section 197.323.<sup>1174</sup>

Palmer wanted the court to follow *Chihocky v. Crapo*<sup>1175</sup> and hold that the failure to send an exemption renewal application was equal to the failure of the property appraiser to publish notice of the certification of the tax roll as required by statute.<sup>1176</sup> Therefore, the sixty-day period should be tolled.<sup>1177</sup> The Third District Court of Appeal disagreed.<sup>1178</sup> In *Chihocky*, the appraiser

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1167. *Id.* at 810 (quoting FLA. STAT. § 196.011(6) (1995)).

1168. *Palmer*, 681 So. 2d at 810.

1169. *Id.*

1170. *Id.*

1171. *Id.*

1172. *Id.*

1173. *Palmer*, 681 So. 2d at 810.

1174. *Id.* (quoting FLA. STAT. § 194.171(2) (1988)).

1175. 632 So. 2d 230 (Fla. 1st Dist. Ct. App. 1994).

1176. *Palmer*, 681 So. 2d at 810.

1177. *Id.* See also *Chihocky v. Crapo*, 632 So. 2d 230 (Fla. 1st Dist. Ct. App. 1994).

1178. *Palmer*, 681 So. 2d at 810.

failed to comply with statutory notice.<sup>1179</sup> *Chihocky* was never extended to cases where the taxpayer received actual notice of the date of the certification of the tax roll.<sup>1180</sup>

Here, the failure to send the renewal application did not affect Palmer's ability to challenge the denial of the exemption because it had actual notice of the date of the certification of the tax roll.<sup>1181</sup> The action to challenge the tax assessment took place two and a half years later.<sup>1182</sup> The Property Appraisal Adjustment Board's final decision in the 1988 litigation was in July, 1989, and the property appraiser appealed on August 25, 1989.<sup>1183</sup> When the sixty-day period expired on December 18, 1989, Palmer must have known it was not certain the exemption would be approved.<sup>1184</sup> The statute of nonclaim was strictly enforced, and as such, no exception would be made in this case.<sup>1185</sup>

*Tamar 7600, Inc. v. Orange County.*<sup>1186</sup> The Fifth District Court of Appeal reversed the dismissal of the entire case and directed the lower court to permit Tamar to amend the complaint to allege claims such as those set forth in Counts II-VI, and X.<sup>1187</sup> This case involved Orange County's assignment of a one percent tourist tax pursuant to Florida's Local Option Tourist Development Act.<sup>1188</sup> The statute authorized the county to impose taxes on short term rentals of living quarters within the county for certain purposes unless an exemption applied.<sup>1189</sup> The tourist tax was enacted to get funds for the construction of a baseball stadium.<sup>1190</sup> The letter of intent executed obligated Orange County and the City to work with baseball owners in an attempt to bring major league baseball to the Orlando area.<sup>1191</sup> If the attempt was successful, Orange County and the City were to enter a baseball stadium lease within the parameters of a "Summary of Expected Lease Terms."<sup>1192</sup>

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1179. *Id.*

1180. *Id.*

1181. *Id.*

1182. *Id.*

1183. *Palmer*, 681 So. 2d at 811.

1184. *Id.*

1185. *Id.*

1186. 686 So. 2d 790 (Fla. 5th Dist. Ct. App. 1997).

1187. *Id.* at 793.

1188. *Id.* at 790. *See also* FLA. STAT. § 125.0104(3)(l) (1993).

1189. *Tamar*, 686 So. 2d at 790 (citing FLA. STAT. § 125.0104(3)(l) (1993)).

1190. *Id.*

1191. *Id.*

1192. *Id.* at 791.

The "Summary of Expected Lease Terms" required Orange County to construct the stadium while baseball owners would retain revenues from the ballpark.<sup>1193</sup> However, the owners were to assume all responsibility for facility operations. In addition, when the lease was up, the baseball owners had a first option to purchase the ballpark. The County's Board of Commissioners approved a "Revised Summary of Expected Lease Terms" which kept the earlier terms and amended them.<sup>1194</sup> The Board adopted the resolution imposing the tourist tax and adopted a Budget Resolution which stated how tax revenue would be spent. Tamar filed suit challenging the legality of the tourist tax. The lower court granted Orange County's motion to dismiss.<sup>1195</sup> Hotel Group filed a motion to amend the amended complaint.<sup>1196</sup>

This court recognized the lower court's refusal to allow any amendment and the dismissal of the entire suit was erroneous in light of Tamar's raising the issue concerning the county's power to assess tax and then accrue the money to fund a project not permitted under section 125.0104(3)(l) of the *Florida Statutes*.<sup>1197</sup> The court concluded that the county could not assess and accrue tax money for the purpose of spending it on a ballpark under a specific agreement and then dictate that the taxpayer had no right to challenge the matter.<sup>1198</sup> If the county embarked on the enterprise, there must be a present right to challenge its legality since the legality would affect the existence of the tax.<sup>1199</sup>

*TEDC/Shell City, Inc. v. Robbins*.<sup>1200</sup> The Third District Court of Appeal affirmed final summary judgment denying the taxpayers ad valorem tax exemption.<sup>1201</sup> Tacolcy acquired property from Dade County and accepted a restrictive deed obligating it to build low income housing controlled by rental regulatory agreements. The agreements mandated that Tacolcy would operate the buildings as low income housing for thirty years. If the deed restriction was violated, the property reverted to Dade County.<sup>1202</sup>

The taxpayers filed an application for a 1991 ad valorem tax charitable exemption. The application was denied and taxpayers appealed to the Dade County Value Adjustment Board ("VAB") which granted the

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1193. *Id.*

1194. *Tamar*, 686 So. 2d at 791.

1195. *Id.*

1196. *Id.* at 792.

1197. *Id.* at 793.

1198. *Id.*

1199. *Tamar*, 686 So. 2d at 793.

1200. 690 So. 2d 1323 (Fla. 3d Dist. Ct. App. 1997).

1201. *Id.* at 1323.

1202. *Id.*

petition.<sup>1203</sup> The property appraiser appealed. The next year, taxpayers again sought a charitable exemption for ad valorem tax, and it was again denied by the property appraiser. However, the VAB granted a seventy-five percent exemption for the 1992 tax year. The property appraiser appealed and the two appeals from the 1991 and 1992 actions were consolidated.<sup>1204</sup>

The issue before this court was “[w]hether a federal income tax credit inuring to a taxpayer is a *benefit* that disqualifies a taxpayer from exempt entity status under section 196.195(3), Florida Statutes (1991), and therefore disqualifies the taxpayer from receiving an ad valorem tax charitable exemption.”<sup>1205</sup> This court held the entity receiving such a credit did not qualify for exempt entity status.<sup>1206</sup> In addition, to receive ad valorem tax exemption, the property must be “‘owned by an exempt entity and used exclusively for exempt purposes.’”<sup>1207</sup> Section 196.195 of the *Florida Statutes* gives criteria to determine whether an entity is a nonprofit venture eligible for exemption.<sup>1208</sup> Here, the question centered on the requirement that taxpayers “‘affirmatively show that no part of the subject property, or the proceeds of the sale, lease, or other disposition thereof, will inure to the benefit of its members, directors, or officers or any person or firm operating for profit or for a nonexempt purpose.’”<sup>1209</sup>

“The plain language of section 196.195(3) require[d] an exemption applicant to demonstrate that the entity . . . [was] *not* receiving any benefits from the property.”<sup>1210</sup> Even though the taxpayers did not realize profits from the property, the receipt of a federal income tax credit on behalf of the partners was a benefit as based on its plain and ordinary meaning.<sup>1211</sup> Since the taxpayers were receiving a benefit in the form of an income tax credit, they were not exempt entities allowed to qualify for the exemption from ad valorem taxation.<sup>1212</sup>

*Terra Mar Capital, Inc. v. Auxier.*<sup>1213</sup> The Fourth District Court of Appeal affirmed the trial court’s setting aside of a tax deed because proper

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1203. *Id.* at 1324.

1204. *Id.*

1205. *Robbins*, 690 So. 2d at 1324.

1206. *Id.*

1207. *Id.* (quoting FLA. STAT. § 196.192(1) (1991)).

1208. *Id.*; see FLA. STAT. § 196.195 (1991).

1209. *Robbins*, 690 So. 2d at 1324 (quoting FLA. STAT. § 196.195(3) (1991)).

1210. *Id.* at 1325.

1211. *Id.*

1212. *Id.*

1213. 694 So. 2d 779 (Fla. 4th Dist. Ct. App. 1997).



notice was not received.<sup>1214</sup> An executors deed was recorded showing ownership of property by Janice Fay Underdown Auxier, Patricia Ann Underdown Smith, and Charlotte Underdown (deceased). The property was subject to a lease term of ninety-nine years and was used as a parking lot.<sup>1215</sup>

Section 197.522(1)(a) of the *Florida Statutes* requires notice be given to an owner.<sup>1216</sup> In turn, section 197.502(4)(a) of the *Florida Statutes* states notice must be sent to “[a]ny legal title holder of record if the address of the owner appears on the record of conveyance of the lands to the owner.”<sup>1217</sup> Here, appellees were not given proper notice because the recorded deed gave the full names of the three owners individually with their mailing addresses, while the notice was mailed to a Fort Lauderdale address to the name “Underdown Smith & Auxier.”<sup>1218</sup> Since it was likely that all owners did not reside at the same address, notice must be given to each owner. No notice was given in this case.<sup>1219</sup>

*Washington Square Corp. v. Wright.*<sup>1220</sup> The First District Court of Appeal affirmed the circuit court’s final order of dismissal because the failure to pay ad valorem taxes in succeeding years extinguished the right to maintain a contest, unless the taxpayer sought timely review of every assessment as to which taxes were not paid in full.<sup>1221</sup> Washington Square Corporation (“Corporation”) owned real property in Washington County. The Corporation petitioned Washington’s Property Appraisal Adjustment Board seeking review and adjustment of the ad valorem tax assessment received for the 1993 year. After the Board denied review, the Corporation paid the amount owed and filed a complaint seeking an adjustment of the appraisal attaching the receipt of the paid tax amount to the complaint. The Corporation also paid the assessments for the years 1994 and 1995 which were less than the 1993 year that was petitioned.<sup>1222</sup>

The issue before the court was “what the statute require[d] to prevent dismissal of a judicial challenge to an assessment, when duly initiated court proceedings have not concluded by the time taxes fall due in subsequent year(s).”<sup>1223</sup> Section 194.171 of the *Florida Statutes* provides that no tax

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1214. *Id.* at 779.

1215. *Id.*

1216. *Id.* See also FLA. STAT. § 197.522(1)(a) (1993).

1217. *Auxier*, 694 So. 2d at 780 (citing FLA. STAT. § 197.502(4)(a) (1993)).

1218. *Id.*

1219. *Id.*

1220. 687 So. 2d 1374 (Fla. 1st Dist. Ct. App. 1997).

1221. *Id.* at 1374.

1222. *Id.* at 1374-75.

1223. *Id.* at 1375.

assessment can be contested unless all the taxes due in the subsequent years after the action is brought are timely paid.<sup>1224</sup>

The circuit court concluded that the Corporation's failure to pay ad valorem taxes in full for the 1994 and 1995 taxable years required dismissal of its complaint challenging the 1993 Board's assessment.<sup>1225</sup> This court recognized that the Corporation, after it paid in good faith estimates of the 1994 and 1995 tax assessments, could obtain judicial review of them by filing suits within the time period allowed.<sup>1226</sup> However, the time expired. Thus, "[n]o action shall be brought to contest a tax assessment after [sixty] days from the date the assessment being contested is certified for collection" unless the petition is pending before the Board when the assessment is certified for collection.<sup>1227</sup>

Once the time to bring the contest had passed, the tax assessments for the 1994 and 1995 years were no longer subject to adjustment.<sup>1228</sup> The full amount was owed. Since judicial review for the 1994 and 1995 years were not timely sought and the full amount was not paid, the Corporation's complaint challenging the 1993 assessment must be dismissed.<sup>1229</sup>

*Westring v. Florida.*<sup>1230</sup> The Third District Court of Appeal affirmed the lower court's dismissal of the action on the ground that Westring did not file for a refund of a documentary stamp tax paid at the time a quitclaim deed conveying title to the home was executed.<sup>1231</sup> In 1994, Westring and his wife at the time executed a quitclaim deed conveying title to their home from the entireties back to Westring individually (provided by marital settlement agreement).<sup>1232</sup> Westring paid a documentary stamp tax even though no money changed hands and the outstanding mortgage was not affected. Westring sued individually and as the representative of a class of similar taxpayers. Westring sought declaratory and injunctive relief and a refund of the tax, contending that it was invalidly imposed.<sup>1233</sup> The certified question is whether a plaintiff challenging the validity of a specific tax must first request a refund before a court can exercise jurisdiction over the action.<sup>1234</sup>

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1224. *Id.* See also FLA. STAT. § 194.171 (1995).

1225. *Wright*, 687 So. 2d at 1375.

1226. *Id.*

1227. *Id.* (citing FLA. STAT. § 194.171(2) (1993)).

1228. *Id.*

1229. *Id.*

1230. 682 So. 2d 171 (Fla. 3d Dist. Ct. App. 1996).

1231. *Id.* at 171-72.

1232. *Id.* at 171.

1233. *Id.* at 172.

1234. *Id.*

Westring is required to file a claim for a refund of the tax pursuant to section 215.26 of the *Florida Statutes* before seeking jurisdiction of the circuit court.<sup>1235</sup> The nature of nonclaim statutes is to preclude a right of action unless and until the claim is filed within the time period designated by statute.<sup>1236</sup> Since Westring was still within the three-year-statutory nonclaim period specified by section 215.26 of the *Florida Statutes*, the district court dismissed Westring's complaint without prejudice so that Westring could apply for a refund in accordance with the statute.<sup>1237</sup>

## XXVII. CONCLUSION

The foregoing survey of cases and legislation presents selected materials of significance to real estate professionals. Although there seems to be no consistent pattern to the case law and legislative development, the survey is useful in maintaining contact with the progression of real property law.

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1235. *Westring*, 682 So. 2d at 172. See also FLA. STAT. § 215.26 (1993).

1236. *Westring*, 682 So. 2d at 172.

1237. *Id.*

